No. 04-1186
Title: Wachovia Bank, National Association, Petitioner
v.
Daniel G. Schmidt, III, et al.
Docketed: March 8, 2005
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (03-2061)
Decision Date: November 1, 2004
Rehearing Denied: January 28, 2005

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Mar 4 2005	Petition for a writ of certiorari filed. (Response due April 7, 2005)
Mar 28 2005	Waiver of right of respondents Daniel G. Schmidt, III, et al. to respond filed.
Apr 6 2005	DISTRIBUTED for Conference of April 22, 2005.
Apr 18 2005	Response Requested . (Due May 18, 2005)
May 18 2005	Brief of respondents Daniel G. Schmidt, III, et al. in opposition filed.
May 23 2005	Reply of petitioner Wachovia Bank, National Association filed. (Distributed)
May 24 2005	DISTRIBUTED for Conference of June 9, 2005.
Jun 13 2005	Petition GRANTED. Justice Thomas took no part in the consideration or decision of this petition.
Jul 15 2005	Motion to dispense with printing the joint appendix filed by the parties.
Jul 19 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including August 18, 2005.
Jul 25 2005	SET FOR ARGUMENT on November 28, 2005.
Aug 5 2005	CIRCULATED.
Aug 18 2005	Brief amicus curiae of Clearing House Association LLC filed. (Distributed)
Aug 18 2005	Brief of petitioner Wachovia Bank, National Association filed. (Distributed)
Aug 18 2005	Brief amicus curiae of United States filed.
Aug 18 2005	Brief amicus curiae of JPMorgan Chase Bank, NA filed. (Distributed)
Aug 18 2005	Brief amicus curiae of American Bankers Association filed. (Distributed)
Aug 22 2005	Motion to dispense with printing the joint appendix filed by petitioner GRANTED. Justice Thomas took no part in the consideration or decision of this motion.
Sep 7 2005	Extension of time within which to file respondents' brief on the merits to and including October 13, 2005.

Oct 13 2005	Brief of respondents Daniel G. Schmidt, III, et al. filed. (Distributed)
Oct 25 2005	Record received from U.S.C.A. - 4th Circuit. (1 envelope)
Oct 27 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 31 2005	Record received from U.S.D.C. for the District of South Carolina. (1 envelope)
Nov 7 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Thomas took no part in the consideration or decision of this motion.
Nov 16 2005	Reply of petitioner Wachovia Bank, National Association filed. (Distributed)
Nov 28 2005	Argued. For petitioner: Andrew L. Frey, New York, N.Y.; and Sri Srinivasan, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: James R. Gilreath, Greenville, S.C. Justice Thomas out.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

WACHOVIA BANK, NATIONAL ASSOCIATION,
Petitioner,

v.

DANIEL G. SCHMIDT III, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

28 U.S.C. § 1348 provides that, with limited exceptions that are inapplicable here, "[a]ll national banking associations shall * * * be deemed citizens of the States in which they are respectively located."

The questions presented are (i) whether, for purposes of federal diversity jurisdiction, a national banking association is "located" in, and thus deemed to be a citizen of, every state in which the association maintains a branch, as held by the court below, or instead has a more limited citizenship, as held by three other courts of appeals; and (ii) whether the word "located," as used in 28 U.S.C. § 1348, is ambiguous.

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING

Pursuant to this Court's Rule 29.6, petitioner states that its parent company is Wachovia of Alabama, Inc. The parent company of Wachovia of Alabama, Inc. is Wachovia Corporation, a publicly held corporation. Wachovia Corporation indirectly holds 100% of petitioner's equity.

The parties to the proceeding in the court of appeals were Wachovia Bank, National Association; Daniel G. Schmidt, III; Priag LLC; and DGS Investments, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wachovia Bank, National Association ("Wachovia") respectfully petitions the Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-46a) is reported at 388 F.3d 414. The order of the court of appeals denying rehearing and rehearing en banc, and the accompanying dissent (App., *infra*, 57a-62a), are unreported. The opinion of the district court (App., *infra*, 47a-56a) is unreported.

JURISDICTION

The court of appeals' judgment was entered on November 1, 2004. A timely petition for rehearing was denied on January 28, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332(a) (1993 & Supp. 2004) provides, in pertinent part:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States * * * .

28 U.S.C. § 1348 (1993 & Supp. 2004) provides:

> The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any

such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

All national banking associations shall, for the purpose of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

INTRODUCTION

This petition presents an issue on which it is imperative to have a uniform national rule: how the citizenship of national banks is to be determined for purposes of exercising federal diversity jurisdiction. A divided panel of the Fourth Circuit, construing 28 U.S.C. § 1348, held that a national bank is "located" in, and thus a citizen of, *every* state in which it maintains a branch. This holding expressly contradicts the decisions of the three other courts of appeals to have resolved the issue; disregards the clear statutory purpose of Section 1348; deprives national banks of the broad access to diversity jurisdiction enjoyed by state-chartered banks and other corporations, which may do business in a number of states but which are deemed "citizens" only of the states in which they are incorporated and in which they have their principal places of business ((see 28 U.S.C. § 1332(c)); departs from a long line of this Court's decisions holding that Congress intended Section 1348 and its statutory predecessors to provide jurisdictional parity between national banks and other corporations (including state banks); and deviates from fundamental principles of statutory interpretation reaffirmed by this Court as recently as this Term.

The Fourth Circuit's holding is wholly insupportable. Indeed, when Wachovia sought rehearing en banc before the Fourth Circuit, a substantial majority of the participating judges *favored* rehearing: of the Circuit's 13 active judges, six voted to grant the petition, while three voted against it

and four recused themselves. Rehearing thus was denied only because the Fourth Circuit's rules require the party seeking en banc review to secure the votes of a majority of judges in regular active service. Fourth Cir. R. 35. In these circumstances, review by this Court plainly is in order.

Currently pending before this Court is a petition for certiorari in *Horton* v. *Bank One, N.A.*, No. 04-989 (filed Jan. 3, 2005), seeking review of the Fifth Circuit's holding that a national bank is *not* a citizen of every state in which the bank has a branch. See *Horton* v. *Bank One, N.A.*, 387 F.3d 426 (5th Cir. Oct. 5, 2004). Should the Court grant the petition for certiorari now pending in *Horton*, Wachovia submits that the Court should also grant the instant petition and consolidate this case with *Horton* pursuant to Rule 27.3. Unlike the Fifth Circuit in *Horton*, the Fourth Circuit in this case endorsed an approach to statutory construction that looks principally to dictionary definitions—to the exclusion of the statutory structure, purpose, and evolution—in determining the meaning of the statute's terms. That approach cannot be reconciled with the fundamental principles of statutory interpretation this Court recently reaffirmed in *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, ___ U.S. ___, 125 S. Ct. 460 (2004). Granting review in this case and consolidating it with *Horton* would allow the Court to address directly the important and recurring issue posed by the Fourth Circuit's technique for analyzing statutory text.

STATEMENT

Wachovia commenced this action by filing a petition to compel arbitration in the United States District Court for the District of South Carolina. Wachovia is a national banking association with its main office in Charlotte, North Carolina. Respondents are all citizens of South Carolina. Accordingly, Wachovia asserted in its petition that the district court possessed diversity jurisdiction over the action pursuant to 28 U.S.C. § 1332. It is undisputed that, if Wachovia were a state

bank (or, for that matter, any corporate entity other than a national bank), diversity jurisdiction would exist.

The district court assumed jurisdiction over the action but dismissed Wachovia's petition on the merits, ruling that respondents were under no obligation to arbitrate their claims. Wachovia timely appealed that ruling to the United States Court of Appeals for the Fourth Circuit. Respondents challenged the district court's subject matter jurisdiction before the court of appeals. The basis for respondent's challenge was that, pursuant to Section 1348, Wachovia is "located" in, and thus a citizen of, *every* state in which it maintains a branch. Wachovia maintains branches in South Carolina, the state where respondents are citizens. Therefore, respondents contended, the federal courts lack diversity jurisdiction over Wachovia's petition to compel arbitration.

Ultimately, over a vigorous dissent by Judge King, the court of appeals construed Section 1348 to mean that Wachovia is a citizen of every state in which it maintains a branch, declaring that to be the statute's "unambiguous" meaning. The Fourth Circuit acknowledged that the three other circuit courts to have ruled on the question had reached the opposite conclusion, but it dismissed these contrary rulings, observing:

> [Q]uestions of statutory interpretation are not decided by majority vote of the courts of appeals, and bare citations to decisions by other courts cannot substitute for analysis. * * * That our sister circuits may disagree with us in any given case is significant only insofar as their reasoning is persuasive. Here, that reasoning is simply unconvincing.

App., *infra*, 30a-31a (citations omitted).

Having concluded that diversity jurisdiction is lacking, the court of appeals vacated the district court's ruling and ordered the case dismissed. Wachovia timely petitioned the court of appeals for rehearing and for rehearing *en banc*, but

the petition was denied, even though a majority of the judges who actually voted on the petition favored granting it. App., *infra*, 57a-58a.

While Wachovia's petition for rehearing was pending, the Office of the Comptroller of the Currency secured leave to file an *amicus curiae* brief in support of the petition. App., *infra*, 65a-78a. Asserting in its brief that "the question of a national bank's citizenship for purposes of diversity jurisdiction raises an issue of exceptional importance" (*id.* at 67a), the Comptroller urged the court of appeals to hold—consistently with the other three circuits that had squarely addressed the issue—that a national bank is *not* a citizen of every state in which it maintains a branch.

REASONS FOR GRANTING THE PETITION

At least three compelling reasons support the grant of certiorari in this action. First, and without dispute, the court of appeals' decision has created an irreconcilable circuit conflict on a jurisdictional issue of great legal and practical significance; this is a question on which it is utterly untenable to have conflicting rules in the various circuits, since both plaintiffs and national banks (depending on who sues first) can manipulate jurisdiction by selecting a forum friendly to their interests. Second, the court of appeals' holding is at odds with a number of decisions of this Court that have construed Section 1348 and its predecessors to maintain jurisdictional parity between national banks and other corporations. Finally, using a mode of analysis that cannot be reconciled with this Court's opinion in *Koons*, 125 S. Ct. 460, the court of appeals failed to acknowledge the ambiguity of the term "located" in Section 1348, thereby ignoring the statute's broader context and frustrating Congress's ultimate legislative purpose. The Court should grant review to correct the Fourth Circuit's errors on these points.

I. THE COURTS ARE DIVIDED ON THE SIGNIFICANT QUESTION WHETHER A NATIONAL BANK IS DEEMED A CITIZEN OF EVERY STATE IN WHICH IT MAINTAINS A BRANCH.

A. This Case Squarely Presents A Direct Conflict Among The Courts Of Appeals.

As the Fourth Circuit specifically acknowledged (App., *infra*, 5a), its ruling has created an irreconcilable conflict among the courts of appeals. The Fourth Circuit has ruled that a national bank is "located" in every state in which it has a branch. The Fifth and Seventh Circuits, on the other hand, have held that a national bank is "located" in—and therefore is a citizen of—only the state where it maintains its principal place of business and the state named in the bank's organization certificate.[1] See *Firstar Bank, N.A.* v. *Faul*, 253 F.3d 982 (7th Cir. 2001); *Horton*, 387 F.3d 426. Likewise, construing the immediate predecessor to Section 1348, the Ninth Circuit concluded that a national bank should not be deemed a citizen of every state in which it has a branch. *American Surety Co.* v. *Bank of California*, 133 F.2d 160 (9th Cir. 1943).[2] As evidenced by a public Interpretive Letter and the *amicus curiae* brief that it filed in this case, the Comptroller of the Currency is likewise of the view that "[n]ational banks are to be treated for diversity jurisdiction purposes in a manner similar to state banks." O.C.C. Inter. Ltr. 952 (Oct. 2002), 2003 WL 23221430, at *4; App., *infra*, 65a-78a. Accordingly, the Comptroller supports the holdings of the Fifth, Seventh and Ninth Circuits, advocating an interpretation of Section 1348 that does not deem a national bank to be a citizen of each State in which it maintains a branch. *Id.*

[1] The *Horton* Court held that a national bank is also a citizen of the state named in its articles of association—a distinction without a difference under the circumstances of that case. 387 F.3d at 431 n.26.

[2] The Second Circuit has considered this issue in two cases, but has not squarely decided it. See *United Republic Ins. Co.* v. *Chase Manhattan Bank*, 315 F.3d 168, 169 (2d Cir. 2003) (remanding case to district court to determine whether diversity jurisdiction existed under 28 U.S.C. § 1348); *World Trade Ctr. Props., L.L.C.* v. *Hartford Fire Ins. Co.*, 345 F.3d 154, 161 (2d Cir. 2003) (suggesting, in *dictum*, that a national bank is deemed by 28 U.S.C. § 1348 "to be a citizen of every state in which it has offices").

The district courts within the circuits that have not squarely addressed Section 1348 are also deeply divided. Considering the circuit split alongside the division among district courts since 1992, a picture of confusion and uncertainty emerges for litigants across the country.[3]

Not only are the circuit courts split on the ultimate interpretation of "located" in Section 1348, they are divided as to the application of the principal tools that courts use to determine statutory meaning. The Fourth Circuit, for example,

[3] Compare *RDC Funding Corp.* v. *Wachovia Bank, N.A.*, 2004 WL 717111 (D. Conn. Mar. 31, 2004) (unpublished opinion); *Adams* v. *Bank of Am., N.A.*, 317 F. Supp. 2d 935, 941-42 (S.D. Iowa 2004); *MBIA Ins. Corp.* v. *Royal Indem. Co.*, 294 F. Supp. 2d 606 (D. Del. 2003); *Carl* v. *Republic Sec. Bank*, 282 F. Supp. 2d 1358, 1364 n.1 (S.D. Fla.), appeal dismissed, 2003 WL 22172202 (11th Cir. Aug. 5, 2003); *Evergreen Forest Prods. of Ga., LLC* v. *Bank of Am., N.A.*, 262 F. Supp. 2d 1297, 1307 (M.D. Ala. 2003); *Bank of Am., N.A.* v. *Johnson*, 186 F. Supp. 2d 1182, 1183 (W.D. Okla. 2001); and *Financial Software Sys.* v. *First Union Nat'l Bank*, 84 F. Supp. 2d 594, 601 (E.D. Pa. 1999) (all concluding national bank is not a citizen of every state in which it maintains a branch) with *Frontier Ins. Co.* v. *MTN Owner Trust*, 111 F. Supp. 2d 376, 379-80 (S.D.N.Y. 2000); *Ferraiolo Constr., Inc.* v. *Keybank, N.A.*, 978 F. Supp. 23 (D. Me. 1997); *Norwest Bank Minn., N.A.* v. *Patton*, 924 F. Supp. 114, 115 (D. Colo. 1996); *Bank of New York* v. *Bank of Am.*, 861 F. Supp. 225, 231 (S.D.N.Y. 1994); and *Connecticut Nat'l Bank* v. *Iacono*, 785 F. Supp. 30 (D.R.I. 1992) (all holding national bank is a citizen of every state in which it has a branch).

rested its decision primarily on its assumption that the word "located" is plain and unambiguous, requiring no resort to extra-textual interpretive aids. App., *infra*, 4a-7a. The Fifth and Seventh Circuits, on the other hand, heeding this Court's admonition that "there is no enduring rigidity about the word 'located'" (*Citizens & S. Nat'l Bank* v. *Bougas*, 434 U.S. 35 (1977)), concluded that the term *is* ambiguous. *Faul*, 253 F.3d at 987-88; *Horton*, 387 F.3d at 429. Consequently, both the Fifth and Seventh Circuits considered it important to analyze Section 1348's statutory and jurisprudential history, which both courts construed as requiring the maintenance of jurisdictional parity between national banks and other corporations. *Faul*, 253 F.3d at 988; *Horton*, 387 F.3d at 431. The Fourth Circuit, analyzing the same sources, concluded that they evidenced a "progressive[]" *retreat* from parity. App., *infra*, 24a-25a (emphasis in original).

Finally, the circuits also differ on the relevance of *Bougas*, 434 U.S. 35, a decision of this Court that interpreted the word "located" in a former version of the national bank venue statute. The Seventh Circuit, noting that this Court had expressly limited its holding in *Bougas* to the venue statute at issue in that case, refused to apply *Bougas*'s definition of "located" to Section 1348. *Faul*, 253 F.3d at 989. Explaining the fundamental distinction between venue and jurisdiction in the federal courts, the Seventh Circuit observed that "[w]e have previously counseled against relying on interpretations of venue provisions to discern the meaning of jurisdictional statutes." *Id.* at 991. The Fourth Circuit, by contrast, minimized the distinction between venue and jurisdiction and, invoking the *in pari materia* doctrine, applied *Bougas*'s definition of "located" to Section 1348. App., *infra*, 13a-17a.

In short, the divide between the circuits on the interpretation of Section 1348 is deep—as to both reasoning and result. That divide has generated a series of thoroughly reasoned and comprehensive opinions (and, in this case, a lengthy and well-reasoned dissent) that makes the question presented by

this petition ripe for consideration by this Court. Because the court below created the conflict by addressing, and repudiating, the analyses of the Seventh and Fifth Circuits, granting review in both this case and in *Horton* would allow for the fullest presentation of the issues to this Court.

B. The Circuit Conflict Involves A Recurring Issue Of Great Practical Importance.

The jurisdictional question presented by this petition is not merely academic, but is of great practical significance, for many national banks are multi-state operations that maintain branches in several judicial circuits. Wachovia, for example, has branches in sixteen states,[4] including four of the five states in the Fourth Circuit, two states in the Fifth Circuit, and states in five other circuits. See FDIC Institution Directory, http://www2.fdic.gov/idasp/main.asp (last visited Feb. 27, 2005) (providing demographic information about federally-insured institutions, current as of Feb. 23, 2005). As a result of the court of appeals' holding in this case, Wachovia is assured of diversity jurisdiction in the Fifth Circuit but is limited to other bases for jurisdiction in the Fourth Circuit (where it is headquartered). And given the uncertainty engendered by the existing circuit split, Wachovia's ability to invoke diversity jurisdiction in the remaining circuits where it operates branches cannot be reliably predicted.

Wachovia is far from the only victim of the "immediate injury" and "disruptive consequences" (App., *infra*, 59a, 61a-62a (King, J., dissenting)) created by the Fourth Circuit's ruling. One hundred sixty-one national banks operate interstate branches. See FDIC Institution Directory, *supra*. Of those national banks, over thirty maintain at least one branch in the Fourth Circuit. See *id.* The largest national bank in the coun-

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[4] For purposes of this discussion, and as is the case for diversity jurisdiction analysis, Wachovia refers to the District of Columbia as a state. 28 U.S.C. § 1332(d).

try, Bank of America, N.A., maintains its headquarters in North Carolina and operates branches in thirty states, and thus would be deemed a citizen of each of those states under the Fourth Circuit's ruling. See *id*. For the moment, then, accidents of geography, rather than uniform jurisdictional principles, control the doors of the federal courthouse.[5]

Moreover, the existing circuit split prevents national banks from being able consistently to shield themselves from potential local bias in diversity actions by exercising a right of removal to federal court under 28 U.S.C. § 1441. Though this right remains available to national banks in the Fifth, Seventh and Ninth Circuits, it is unavailable in the Fourth Circuit and is in doubt in the remaining circuits. Because plaintiffs (including banks themselves when they initiate an action) possess the right to select the forum in the first instance, the circuit split is a prescription for forum shopping that should not be permitted to persist.

This Court has described rules governing federal subject matter jurisdiction as being so important that appellate courts have a "special obligation" to satisfy themselves of jurisdiction in every case. *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). Indeed, the Court has not hesitated to act to correct the disruption caused by the inconsistent application of subject matter jurisdiction principles. *E.g.*, *Roche* v. *Lincoln Prop. Co.*, 373 F.3d 610 (4th Cir. 2004), cert

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[5] The Fourth Circuit's decision has already caused courts to dismiss or hold in abeyance a number of pending actions in which jurisdiction has been based solely on diversity of citizenship, resulting in significant disruption, judicial inefficiency, and expense. See, *e.g.*, *Coots* v. *Wachovia Bank, N.A.*, 8:03-CV-00705 (D. Md. Feb. 11, 2005) (memorandum opinion) (App., *infra*, 63a-64a); *Nat'l Union Fire Ins. Co.* v. *Mfrs. and Traders Trust Co.*, No. 03-2276 (4th Cir. Jan. 28, 2005); *Friel Prosthetics, Inc.* v. *Bank of America, N.A.*, 2005 WL 348263 (D. Md. Feb. 9, 2005); *Stewart* v. *Bank of America, NA*, No. DKC 2004-2482 (D. Md. Feb. 9, 2005).

granted, 73 U.S.L.W. 3338 (U.S. Feb. 28, 2005) (No. 04-712); *Carden* v. *Arkoma Assoc.*, 490 U.S. 1045 (1989) (granting certiorari to resolve circuit split as to rule of citizenship of limited partnerships for purposes of diversity jurisdiction); *Peacock* v. *Thomas*, 514 U.S. 1126 (1995) (granting certiorari to resolve circuit split as to ancillary jurisdiction). Petitioner respectfully submits that the Court should act similarly here.

II. THE DECISION BELOW DISREGARDS HOLDINGS OF THIS COURT THAT 28 U.S.C. § 1348 AND ITS STATUTORY PREDECESSORS WERE INTENDED TO MAINTAIN JURISDICTIONAL PARITY BETWEEN NATIONAL BANKS AND OTHER CORPORATIONS.

The Fifth and Seventh Circuits rested their decisions that national banks are not citizens of all states in which they maintain branches largely on a series of decisions from this Court holding that Section 1348 and its predecessors were intended to further Congress's goal of maintaining jurisdictional parity between national banks and other corporations. The Fourth Circuit, as noted above, rejected both the holdings of the Fifth and Seventh Circuits and their construction of relevant authority from this Court. Such apparent disregard of this Court's decisions offers a separate and independent basis for granting certiorari in this action.

Section 1348 has its roots in the National Bank Act of 1863, which provided that any suit by or against a national bank could be brought in federal court. See 12 Stat. 665, 681 (1863). In 1882, however, Congress eliminated general federal question jurisdiction for suits involving national banks, while preserving diversity jurisdiction and parity in the treatment of national and state banks. See 22 Stat. 162, 163

(1882) (the "1882 Act").[6] This Court soon held that the 1882 Act was intended "to put national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States." *Leather Mfrs. Nat'l Bank* v. *Cooper*, 120 U.S. 778, 780 (1887).

In 1887, Congress modified the 1882 Act, inserting the language that appears in the current 28 U.S.C. § 1348 and that is at issue here: "That all national banking associations * * * shall * * * be deemed citizens of the states in which they are respectively located[.]" 24 Stat. 552 (the "1887 Act"); see also 25 Stat. 433 (1888) (correcting the text of the 1887 Act). This Court confirmed, in *Petri* v. *Commercial National Bank of Chicago*, 142 U.S. 644, 651 (1895), that Congress intended the 1887 Act to have the "same effect and operation" as the 1882 Act: to eliminate general federal question jurisdiction over national banks, while preserving diversity jurisdiction over such banks to the same extent that such jurisdiction could be exercised over state corporations and individuals. Indeed, the *Petri* Court observed that "[n]o reason is perceived why it should be held that congress [*sic*] intended that national banks should not resort to federal tribunals as other corporations and individual citizens might." *Id.*

In 1911, Congress amended the 1887 Act and incorporated it into the Judicial Code. 36 Stat. 1091 (1911). This Court considered the 1911 amendment in 1915 and ruled that

[6] The 1882 Act provided: "That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national-banking associations * * * shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business when such suits may be begun[.]" 22 Stat. 162, 163 (1882).

it was not intended to effect any substantive change in the law. *Herrmann* v. *Edwards*, 238 U.S. 107, 118 (1915). Rather, the Court later observed, the 1911 version of the Judicial Code was merely a "continuation [] of existing statutes, and no change of intent is to be implied unless clearly manifest." *Federal Intermediate Credit Bank at Columbia, S.C.* v. *Mitchell*, 277 U.S. 213, 216 (1928) (explaining holding of *Herrmann*).

Finally, in 1948—three years after the Ninth Circuit's holding in *American Surety* that national banks are *not* citizens of all states in which they maintain branches—Congress recodified the language now appearing in Section 1348 without substantive change. In 1963, this Court restated *Petri*'s longstanding interpretation of Section 1348's statutory predecessor, remarking that "Section 4 [of the 1882 Act] apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited." *Mercantile Nat'l Bk. of Dallas* v. *Langdeau*, 371 U.S. 555, 565-66 (1963). Congress has not amended the text of Section 1348 since 1948.

As this Court repeatedly acknowledged in *Cooper, Petri, Herrmann*, and *Langdeau*, then, the history of Section 1348 reflects Congress's consistent intention to maintain jurisdictional parity between national banks on the one hand, and state banks and other corporations on the other. In this case, however, the court of appeals failed to acknowledge this intention, instead characterizing the post-1882 changes to the national bank jurisdictional statute as a "progressive[]" *retreat* from parity. App., *infra*, 25a.

This misconstruction of the relevant statutory history rests on a number of fundamental errors. First, the court of appeals misread the significance of the change in text from the 1882 Act to the 1887 Act (App., *infra*, 24a), disregarding the *Petri* Court's conclusion that the two acts were intended

to further the same fundamental *purpose* of jurisdictional parity. See *Petri*, 142 U.S. at 651. Second, the court of appeals placed great emphasis on the deletion of what it characterized as a "clarifying clause about jurisdictional parity"—a deletion that the court believed to have occurred in the 1948 recodification of the statute. App., *infra*, 24a-25a.[7] Yet this Court has twice considered the deletion (which occurred in 1911, not, as the court of appeals assumed, in 1948) and concluded that it was not intended to change the meaning of the statute in any respect. *Mitchell*, 277 U.S. at 216 (explaining holding of *Herrmann*, 238 U.S. 107, that "no change of intent is to be implied unless clearly manifest"). The court of appeals' opinion does not cite *Herrmann* or *Mitchell*, an oversight that goes a long way toward explaining its misconstruction of the relevant statutory history.

In short, the several errors committed by the court of appeals led it to disregard this Court's settled teaching on the purpose of Section 1348 and its statutory predecessors. This Court should grant certiorari to reaffirm its longstanding instruction that those statutes were intended to further Congress's goal of maintaining jurisdictional parity between national banks and other corporations.

III. THE COURT OF APPEALS' INTERPRETATION OF 28 U.S.C. § 1348 OVERLOOKS THE BROADER CONTEXT AND FUNCTION OF THE STATUTE AND FRUSTRATES CONGRESS'S PURPOSE OF MAINTAINING THE COMPETITIVE EQUALITY OF NATIONAL BANKS.

Finally, the Fourth Circuit's error transcends its particular misreading of Section 1348. Just this Term, this Court reaffirmed that "[s]tatutory construction is a 'holistic endeavor'"

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[7] The deleted clause provided: "and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state."

(*Koons*, 125 S. Ct. at 466-67) and that a statute must be examined within the context of its broader legislative scheme. *Id.*; see also *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) (noting that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"). The court of appeals, however, without considering the broader statutory scheme of Section 1348, simply assumed that the word "located" is unambiguous. In doing so, the court relied heavily on dictionary definitions of "located," giving exceedingly short shrift to the broader context of the statute to determine whether an ambiguity existed. If not corrected by this Court, the Fourth Circuit's method of statutory analysis will lead that court into repeated error.

As the Fifth and Seventh Circuits and the dissent below recognized, the word "located" bears no fixed and unambiguous meaning. *Horton*, 387 F.3d at 429; *Faul*, 253 F.3d at 987-88; App., *infra*, 35a-36a (King, J., dissenting). Indeed, when analyzed alongside other provisions of the United States Code dealing with national banks (as *Koons* and other precedent from this Court commands), the ambiguity of the term in Section 1348 becomes apparent. In some statutes, Congress has used the word in a way that presumes a national bank can be "located" only in a single place. *E.g.*, 28 U.S.C. §§ 52, 75, 1394 (1993 & Supp. 2004). In other statutes, however, Congress has used the word in a way that presumes that a national bank has multiple "locations." *E.g.*, 12 U.S.C. §§ 36, 92 (2001 & Supp. 2004). The Fourth Circuit majority ultimately acknowledged these inconsistent definitions, but only after assuming that "located," as used in Section 1348, is unambiguous. App., *infra*, 19a-20a.

As already noted, the court of appeals made a number of errors in construing the statutory history of Section 1348. Perhaps because of its reflexive and strongly-expressed perception that "located" is unambiguous, the court of appeals

made similarly fundamental errors in brushing aside the history of interstate branch banking by national banks—errors that caused it to misconstrue Congress's purpose in enacting Section 1348. Until 1927, federal law did not permit national banks to have any branches at all. See *Bougas*, 434 U.S. at 42-43. That year, however, and again in 1933, Congress responded to an explosion in intrastate branching on the part of state banks by allowing national banks, which then generally operated from only a single location, to operate branches within the same state, but only to the extent that state law afforded state banks the same prerogative. McFadden Act, ch. 191, 44 Stat. 1224 (1927), and as amended by Act of June 16, 1933, ch. 89, 48 Stat. 184; see *First Nat'l Bank of Logan, Utah* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 257-61 (1966) (describing legislative history of 1927 and 1933 intrastate branching acts). This Court has described this legislative action as illustrating Congress's intention "to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned." *Id.* at 261.

The McFadden Act did not allow national banks to have *inter*state branches. See *Northeast Bancorp, Inc.* v. *Board of Gov. of the Fed. Reserve Sys.*, 472 U.S. 159, 169 (1985) (observing that "interstate branch banking was * * * prohibited by the McFadden Act"). It was not until 1994 that Congress, again in an effort to keep national banks competitive with state banks, allowed national banks to establish new interstate branch locations by passing the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. S. Rep. No. 103-240, at 5 (1994) (explaining history of interstate branching); Stacy Stritzel, *The Riegle-Neal Interstate Banking and Branching Act of 1994: Progress Toward a New Era in Financial Services Regulation*, 46 SYRACUSE L. REV. 161 (1995). The court of appeals, however, mistakenly assumed that Congress had allowed interstate branch banking by national banks in the McFadden Act of 1927. App., *infra*, 12a. Consequently, the court of appeals reasoned that Congress

must have had interstate bank branches in mind when it recodified Section 1348 in 1948, and therefore must have believed national banks to be located wherever such branches are present.[8] *Id.*

Largely because of its misinterpretation of the history of interstate branch banking, the court of appeals' decision compels the following paradoxical conclusion: although Congress has acted to keep national banks competitive by dramatically expanding their ability to open branches across state lines, it has—at the same time—significantly curtailed national banks' ability to invoke diversity jurisdiction by making them citizens of every state in which they maintain a branch. This conclusion becomes all the more baffling when one recognizes that, over the past several decades, Congress has resisted calls to limit the scope of diversity jurisdiction by making corporations citizens of every state in which they do business. See Charles W. Joiner, *Corporations as Citizens of Every State Where They Do Business: A Needed Change in Diversity Jurisdiction*, 70 JUDICATURE 291, 294-95 (1987) (describing failed legislative efforts to restrict diversity jurisdiction).

Koons, 125 S. Ct. 460, offers sound guidance to end the paradox created by the court of appeals' decision. There, this Court considered the broad context of a statute, found a textual ambiguity in light of that context, and proceeded to resolve the ambiguity by exploring relevant legislative history

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[8] To be sure, the small handful of interstate branches existing at the time the McFadden Act was passed, which had been allowed under the laws of a few states, continued to operate. See Arthur E. Wilmarth, Jr., *Too Big to Fail, Too Small to Serve? The Potential Risks of National Banks*, 77 IOWA L. REV. 957, 962 n.10 (1992). One cannot reasonably conclude, however, that the existence of a few "grandfathered" interstate branches in 1948 indicates that Congress intended to upset settled jurisprudence when recodifying Section 1348 in that year.

and invoking "common sense" to determine the intention of Congress and the statute's meaning. It is this same "common sense," contextual approach that is called for here. As the Fifth and Seventh Circuits have recognized, the ambiguity in Section 1348 can be resolved only by looking to the broader statutory and jurisprudential history. Nothing in that history suggests that, when Congress made interstate branch banking possible, it simultaneously intended to reverse its longstanding policy of maintaining jurisdictional parity between national and state banks. Thus, review of the Fourth Circuit's decision offers this Court an opportunity to explain further its approach to statutory interpretation—one that carefully considers the broad context of a statute when identifying and resolving textual ambiguity.

* * *

Against this background, if the Court grants certiorari in *Horton*, it also would be appropriate for it to grant review of this petition and to consolidate the cases. After all, the decision below is the one that created the conflict among the courts of appeals in the first place. Moreover, this case more directly presents the broader question of how to determine whether a statutory term is ambiguous. Consideration of this case accordingly would allow for the fullest presentation of issues to the Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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United States Court of Appeals,
Fourth Circuit.

WACHOVIA BANK, NATIONAL ASSOCIATION,
Plaintiff-Appellant,

v.

DANIEL G. SCHMIDT III; PRIAG LLC;
DGS INVESTMENTS, INC.,
Defendants-Appellees.

No. 03-2061.

Argued: June 3, 2004.
Decided: Nov. 1, 2004.

Before LUTTIG and KING, Circuit Judges, and Robert R. BEEZER, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Vacated and remanded by published opinion. Judge LUTTIG wrote the opinion, in which Senior Judge BEEZER joined. Judge KING wrote a dissenting opinion.

OPINION

LUTTIG, Circuit Judge:

Appellant Wachovia Bank, a national banking association with its principal place of business in North Carolina, appeals from the district court's denial of its petition to compel arbitration of claims that appellee Daniel G. Schmidt III brought against Wachovia in state court. On appeal, Schmidt argues for the first time that the district court lacked diversity jurisdiction to entertain Wachovia's petition because Wachovia operates branch offices in South Carolina, the state of which Schmidt is a resident. We must therefore decide whether a national banking association is, within the meaning of 28 U.S.C. § 1348, "located" in a state in which the banking association operates branch offices, and therefore a citizen of

that state for purposes of diversity jurisdiction. Because we conclude that a national bank is located where it operates branch offices, we vacate the judgment of the district court and remand with instructions to dismiss for lack of jurisdiction.

I.

Appellant Wachovia Bank ("Wachovia") is a national banking association with its principal place of business in Charlotte, North Carolina. *Appellant's Supp. Br.* at 1. Wachovia operates branch offices in a number of other states, including South Carolina. *Id.* Appellee Daniel G. Schmidt III ("Schmidt") is a citizen of South Carolina. J.A. 114.

On April 10, 2003, Schmidt and other plaintiffs filed a complaint in South Carolina state court, naming Wachovia and others as defendants. J.A. 117. The complaint alleged, *inter alia*, that the defendants fraudulently induced the plaintiffs to engage in a risky tax-motivated investment scheme. J.A. 146-48. On June 18, Wachovia filed a petition in the United States District Court in South Carolina seeking an order compelling arbitration and a motion to compel arbitration of the state claims, naming Schmidt and related business entities as defendants. J.A. 113. As the sole basis of jurisdiction, Wachovia's petition invoked the diversity jurisdiction of the district court under 28 U.S.C. § 1332. J.A. 114.

The district court denied Wachovia's petition and motion, without addressing its subject matter jurisdiction, J.A. 380-90, and Wachovia appealed. For the first time, Schmidt argues before us that diversity is lacking because Wachovia is "located" in South Carolina, within the meaning of 28 U.S.C. § 1348.

II.

Section 1348 of title 28 of the United States Code provides in full:

> The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association *established* in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.
>
> All national banking associations shall, for the purposes of all other actions by or against them, be deemed *citizens of the States in which they are respectively located*.

28 U.S.C. § 1348 (emphases added).

Schmidt contends that Wachovia, which operates branch offices in South Carolina, is "located" in that state, and that the district court therefore lacked jurisdiction. We agree. Three traditional tools of statutory interpretation in combination — the ordinary meaning of "located," its use in juxtaposition with the contrasting term "established" in the immediately preceding sentence in section 1348, and the Supreme Court's construction of "located" in a parallel venue statute in *Citizens and Southern National Bank v. Bougas*, 434 U.S. 35 (1977) — confirm that "located" should be construed so as to render banking associations citizens of the states in which they operate branch offices.

A.

It is an axiom of statutory interpretation that the plain meaning of an unambiguous statute governs, barring exceptional circumstances. *See, e.g., Rubin v. United States*, 449 U.S. 424, 430 (1981). Where, as here, the statute does not provide an express definition for the term in question, "we construe [the] statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

In ordinary parlance, the word "located" is a general term referring to physical presence in a place. *See, e.g., Webster's Third New International Dictionary* 1327 (1993) (defining "locate" as "to set or establish in a particular spot or position," and "location" as "a position or site occupied or available for occupancy"); *Black's Law Dictionary* 958 (8th ed.2004) (defining "location" as [t]he specific place or position of a person or thing"). This was equally true in 1948, when section 1348 was enacted, and in 1887, when the phrase "citizens of the States in which they are respectively located" was first added to the predecessor statute to section 1348, *see* Act of Mar. 3, 1887, ch. 373, § 4, 24 Stat. 552, 554-55 ("the 1887 Act"). *See, e.g., Black's Law Dictionary* 1089 (4th ed. 1968) (defining "location" as "site or place"); 8 *Oxford English Dictionary* 1081 (2d ed. 1989) (defining "locate" as "[t]o fix or establish in a place; to settle; *pass.* to be settled, stationed, or situated," and providing examples of usage from 1807 through 1896 that universally involve physical presence in a place). Moreover, the sixth edition of *Black's Law Dictionary*, one of the few sources to consider the past participle "located" separately as a general legal term, emphasized the connotation of *physical* presence. *See Black's Law Dictionary* 940 (6th ed. 1990) (defining "located" separately as "[h]aving *physical presence* or existence in a place" (emphasis added)). Accordingly, the ordinary meaning of "located" suggests that a national bank is "located" wherever it has physical presence.

It is indisputable that a national banking association becomes physically present in a state when it opens branch offices in that state and conducts business there. *See, e.g.*, 12 U.S.C. § 92 (authorizing any national bank "*located and doing business* in any place the population of which does not exceed five thousand inhabitants" to operate as an insurance agent (emphasis added)). It follows that, within the ordinary meaning of "located," a national banking association is "located" wherever it operates branch offices. Indeed, the ordinary meaning of "located" so naturally includes branch offices that a unanimous panel of the Second Circuit commented that section 1348 includes branch offices, without seeing any need for further analysis. *See World Trade Center Properties, LLC v. Hartford Fire Ins. Co.*, 345 F.3d 154, 161 (2d Cir. 2003) ("Defendant Wells Fargo is a national bank . . . and by statute is deemed to be a citizen of *every state in which it has offices*." (emphasis added) (citing 28 U.S.C. § 1348)); *see also United Republic Ins. Co. v. Chase Manhattan Bank*, 315 F.3d 168, 169-70 (2d Cir. 2003) (per curiam) (remanding to the district court to determine whether diversity jurisdiction existed in light of the fact that the defendant bank operated offices in the plaintiff's state).

The Seventh Circuit has come to a contrary conclusion, holding that "located" in section 1348 refers only to a bank's *principal* office and the office listed in its organization certificate. *See Firstar Bank v. Faul*, 253 F.3d 982, 993-94 (7th Cir. 2001); *see also Horton v. Bank One*, 387 F.3d 426 (5th Cir. 2004) (adopting the same result on similar reasoning). While the Seventh Circuit's holding rests largely upon a purposive, historical analysis of the statute, which we address below, *see infra*, it also suggests that the word "located" is ambiguous as between any physical presence and a single, *unique* physical presence. *See id.* at 987 ("[W]hat we are trying to determine is the number or scope of places where a national bank is fixed or established. Some definitions do suggest that 'locate' refers to a particular or specific location."). But this supposed ambiguity is not found in the *ordinary* meaning of "located." Although the definitions cited by the Seventh Circuit (and us) do refer to a "particular or specific location," *see id.* (quoting *Webster's Third* at 1327), they do not include any requirement that the "particular or specific location" be *unique* or exclude *other* distinct locations. Nothing in these definitions suggests that an extended

entity like a national banking association cannot occupy, and thus be "located," in multiple "particular or specific locations" at once. In fact, given that "locate" referred to tracts of land in one of its original applications, *see* 8 *Oxford English Dictionary* at 1081 (defining "locate" as [t]o appoint the place or situation of (the lands referred to in a grant)" and citing usage from 1765 through 1780); *cf. Webster's Third* at 1327 (defining "location" as "an area or tract of land"), it would be odd to restrict the term's application to a *unique* site in the case of other extended entities. A tract of land that stretches across the border of North and South Carolina is "located" in *both* states, not just North Carolina. Likewise is a national bank with its principal office in North Carolina and branch offices in South Carolina "located" in both states.

In light of these definitions, the dissent's conclusion that the word "located" is ambiguous is puzzling. In maintaining that the term "located" is ambiguous, the dissent cites four definitions, all of which establish that "located" refers to a specific place or position. *See post* at 434 & n.2 (citing definitions that define "located" in terms of "specific place or position," "a particular spot or position," "site or place," and "fix or establish in a place"). But the dissent plainly does not attempt to defend the erroneous inference that the Seventh Circuit drew, namely that the *specificity* of the position connoted by "located" implies *uniqueness* of that position; the dissent openly concedes that the word "located" *could* encompass multiple branch offices in multiple states. *See post* at 434 ("In this proceeding, 'located' could refer . . . to any state in which Wachovia has established branch offices."). Thus, every definition the dissent cites supports our conclusion that the word "located" unambiguously includes branch offices, because branch offices plainly have a "specific place or position," are clearly located in a "particular spot or position," and are certainly "fixed or established in a site or place." *See post* at 434 & n.2. Because the dissent cites only

definitions that clearly support our interpretation of the word "located," we are at a loss as to how to address its entirely unsupported conclusion that the word is *ambiguous* with respect to branch offices.

B.

The Supreme Court's decision in *Citizens and Southern National Bank v. Bougas*, 434 U.S. 35 (1977), gives authoritative support to our reliance on the ordinary meaning of "located" in section 1348. In *Bougas*, the Supreme Court interpreted "located" in the former venue statute for national banking associations to include branch offices. *Id.* at 37. *Bougas* must control our interpretation of "located" in the parallel jurisdiction statute for national banks for two reasons: first, in a statutory context almost *identical* to section 1348, the *Bougas* Court applied the canon that different statutory terms in the same section (as those appearing in section 1348, *see* discussion *infra*) should be given different meanings; and second, the venue and jurisdiction statutes should be treated as *in pari materia*, so that the Supreme Court's construction of a term in one statute must control the meaning of the identical term in the other.

i.

It is a principle of statutory interpretation that different words used in the same statute should be assigned different meanings whenever possible. *See, e.g., Cunningham v. Scibana*, 259 F.3d 303, 308 (4th Cir. 2001) ("The use of different terms within related statutes generally implies that different meanings were intended." (quoting 2A Norman J. Singer, *Sutherland's Statutes and Statutory Construction* § 46.06, at 194 (6th ed. 2000))); *cf. White v. Lambert*, 370 F.3d 1002, 1011 (9th Cir. 2004) ("It is axiomatic that when Congress uses different text in 'adjacent' statutes it intends that the different terms carry a different meaning.").

Section 1348 uses two distinct terms to refer to the presence of a banking association: "established" and "located." The first sentence grants the district courts jurisdiction over "any action by a banking association *established* in the district for which the court is held" to enjoin the Comptroller of Currency or his receiver under chapter 2 of title 12. 28 U.S.C. § 1348 (emphasis added). The second sentence says that, for general jurisdictional purposes, national banks shall be "deemed citizens of the States in which they are respectively *located*." *Id.* (emphasis added).

These distinct terms can be given distinct meanings, because a national bank can have two different kinds of presence. First, a bank can have the generic physical presence of operating an office in a state or district. Second, every national banking association is required to designate in its organizational certificate "[t]he place where its operations of discount and deposit are to be carried on." 12 U.S.C. § 22. This specific *charter location* is typically (though apparently it need not always be) the principal place of the bank's business. *See Firstar Bank*, 253 F.3d at 994 n. 6 ("[A] national bank denominating a state other than its principal place of business in its organization certificate apparently either never occurs or is exceedingly rare.").

To give independent meaning to the distinct terms in section 1348, it is most reasonable to understand the place where a national bank is "established" to refer to a bank's charter location, and to understand the place where it is "located" to refer to the place or places where it has a physical presence. This interpretation accords not only with the ordinary meaning of "located," which refers to physical presence in general terms, *see supra*, but also with the ordinary meaning of "established," which connotes specifically an *original* and *permanent* location. *See, e.g., Webster's Third* at 778 (defining "establish" as "to place, install, or set up *in a permanent or relatively enduring* position esp. as regards living quarters,

business, social life, or possession," or "to bring into existence, create, make, start, originate, found, or build usu[ally] *as permanent or with permanence in view*" (emphases added)). A national bank is originally and permanently *established* at its main office, which cannot be moved more than thirty miles outside the city of its original location, and even then only with approval of two-thirds of the shareholders and the Comptroller of Currency. *See* 12 U.S.C. § 30(b). A bank is thereafter and temporarily *located* at its branch offices, which it can open and move at will, subject to the approval of the Comptroller. *See* 12 U.S.C. § 36(i).

In *Citizens and S. Nat'l Bank v. Bougas*, 434 U.S. 35 (1977), the Supreme Court attributed the same two definitions to "established" and "located" in the former venue statute for national banks. The prior version of 12 U.S.C. § 94 at issue in that case read as follows:

> Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be *established*, or in any State, county, or municipal court in the county or city in which said association is *located* having jurisdiction in similar cases.

Bougas, 434 U.S. at 35-36 (emphasis added) (quoting Rev. Stat. § 5198, *as amended by* Act of Feb. 18, 1875, ch. 80, § 1, 18 Stat. 316, 320). The Court noted that the lower courts had reached no consensus on the meaning of "located," but had unanimously concluded that "established" referred to a bank's charter location. *See Bougas*, 434 U.S. at 39 ("The lower federal courts appear to be unanimous in holding that a national bank . . . is 'established' only in the federal district that encompasses the place specified in the bank's charter."); *see also, e.g., Leonardi v. Chase Nat'l Bank*, 81 F.2d 19, 22 (2d Cir. 1936), *cert. denied*, 298 U.S. 677 (1936) ("[T]he district in which the national bank has its principal place of business and which contains the place recited in its charter

. . . should be taken as the proper district for suits against a national bank."). The Court determined that "located," used in close conjunction with "established" in the same statute, must be given a different meaning: "[T]he two words are different . . . . Whatever the reason behind the distinction in the words, it does exist, and we recognize it." *Bougas*, 434 U.S. at 44. The Court concluded that a national bank was "located" in any county where it operated a branch office. *Id.* at 38.

The principle that different terms conjunctively used in the same statute should be given different meanings is *identically* applicable here. Indeed, section 1348 includes the very same words "established" and "located," used in similarly close proximity and in a highly similar context, as did the former version of 12 U.S.C. § 94.[1] As in *Bougas*, the two words must be given their distinct meanings.

Acknowledging this principle of interpretation, the Seventh Circuit argued that the two words in section 1348, "established" and "located," could be given different meanings by construing the place where a bank is "established" to refer to a bank's charter location, and the place where it is "located" to refer to a bank's *principal* place of business — though the two are almost invariably identical. *See Firstar Bank*, 253 F.3d at 992, 994 n.6. Here, Wachovia makes the related observation that branch banking was not permitted for national banks until the McFadden Act of 1927. *See* Act of Feb. 25, 1927, ch. 191, § 7, 44 Stat. 1224, 1228; *see also* Act

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[1] Interestingly and not insignificantly, the two statutes — section 1348 (at issue here) and the former 12 U.S.C. § 94 (at issue in *Bougas*) — are even syntactically nearly identical. The Supreme Court rejected, as in fact materially insignificant to its interpretation of section 94, the only words in section 94 materially different from those chosen by Congress in section 1348. *See Bougas*, 434 U.S. at 45.

of June 16, 1933, ch. 89, § 23, 48 Stat. 162, 189-90 ("the 1933 statute") (permitting national bank branches in places other than the charter location); *Bougas*, 434 U.S. at 43 (noting that the McFadden Act only permitted national bank branches in the same city as the charter location, and that "[i]t was not until 1933 that Congress approved, upon specified conditions, national bank branches beyond the place named in the charter"). Thus, Wachovia argues, at the time of the 1887 Act's enactment, "located" could *only* refer to the principal office of a bank, which was always identical to the charter location. *See Appellant's Supp. Br.* at 3.

As to the Seventh Circuit's interpretation, which has been embraced by the Fifth Circuit, one might object that, as a matter of *practical* effect, it fails to give independent meanings to the terms "located" and "established" in section 1348, because the bank's charter location is almost invariably the same as its principal place of business. *See Firstar Bank*, 253 F.3d at 994 n.6. But we do not rest our disagreement with the Seventh Circuit's application of the statutory canon that different terms should be given different meanings on this ground; rather, we rest our disagreement with our sister circuit on the utterly implausible construction that its interpretation places upon the term "located." We simply do not believe that the place in which a bank is "located" can fairly be understood, without specialized definition (express or contextual), to refer to the place where it primarily conducts its business. And if a bank is said to be "located" *only* in the place in which it primarily conducts its business, and in no other place in which it is physically located — as the Seventh Circuit has held — then we are certain that words have little if any meaning beyond that which the particular speaker employing them says they do.

In sum, if Congress wishes to specify *principal* place of business and thereby exclude branch locations, it can easily do so. And in fact it has done so elsewhere. *See, e.g.*, 12

U.S.C. § 94 (restricting venue of suits against national banking associations to federal district courts and state courts in districts and counties "in which that association's *principal* place of business is located" (emphasis added)). But it did not do so in section 1348, and we should not interpret the provision as if it did.

Wachovia's closely related historical argument is likewise unavailing. Wachovia suggests that, because "located" in the 1887 Act could refer only to a bank's principal office prior to the advent of branch banking in 1927, "located" in section 1348 likewise must be read to refer only to a bank's principal office. *See Appellant's Supp. Br.* at 5. The Supreme Court was unpersuaded in *Bougas* by a similar argument regarding the venue statute, *see* 434 U.S. at 43, and we agree that this logic must be rejected here as well. Under traditional tools of interpretation, the statutory history that Wachovia describes actually supports the opposite conclusion: Congress' readoption of the *general* term "located" in 1948, after it became possible for national banks to locate to other states through branch offices, confirms that Congress did *not* intend to restrict the term to a bank's principal place of business. In 1927, it first became possible (in ordinary parlance) for a national bank to be "located" in a place *either* through its principal office *or* through its branch offices. Congress was aware of this change, having effected the change itself. Because, in reenacting section 1348, Congress did not specify "principal" or "branch" location, but instead retained the general term "located," history reveals, if anything, that Congress did *not* intend to restrict the meaning of "located" beyond its meaning in ordinary parlance and *did* intend to bring branch offices within the scope of the section.

Therefore, the words "established" and "located" should be given distinct meanings in section 1348. As the Supreme Court acknowledged in *Bougas*, "established" most naturally

refers to charter location, while "located" most naturally refers to the site of any office. *Bougas*, 434 U.S. at 44.

ii.

The Supreme Court's interpretation of "located" in *Bougas* controls the meaning of "located" in section 1348 for another reason as well. Because the jurisdiction and venue statutes pertain to the same subject matter, namely the amenability of national banking associations to suit in federal court, under the *in pari materia* canon the two statutes should be interpreted as using the same vocabulary consistently to discuss this same subject matter.

In *Bougas*, the Supreme Court held that the word "located" in the version of the federal venue statute then in effect referred to branch locations. *See Bougas*, 434 U.S. at 45. The version of the venue statute interpreted in *Bougas* was enacted in 1875, and was thus in effect when section 1348 was enacted in 1948. *See* Act of Feb. 18, 1875, ch. 80, § 1, 18 Stat. 320. As described above, section 1348 reflected the terminology of the venue statute by using *both* "established" and "located" to refer to the presence of national banks. *See supra*. Section 1348, the jurisdictional statute, thus adopted precisely the same vocabulary to describe banks' presence as did the then-existing venue statute.

Statutes that are *in pari materia* or relating to the same subject matter are to be interpreted in light of, and consistently with, one another. *United States v. Stewart*, 311 U.S. 60, 64 (1940) ("[A]ll acts *in pari materia* are to be taken together, as if they were one law."). This interpretive principle is especially applicable when the two statutes adopt a single consistent vocabulary in reference to the same subject matter. *See, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) (construing a provision of the ADEA that was "almost in *haec verba* with" a provision of Title VII to reflect judicial constructions of the Title VII provision); *United States v.*

Srnsky, 271 F.3d 595, 602 (4th Cir. 2001) (arguing that the "nearly identical language" in adjacent statutory subsections must be read *in pari materia*). Here, section 1348 adopted the same vocabulary — the terms "established" and "located" — to refer to the same subject matter, namely the location of national banking associations in relation to their capacity for suit, as did the former venue statute. Since the Supreme Court in *Bougas* provided the definitive construction of those terms in the venue statute, the *in pari materia* canon directs us to adopt the same construction for the jurisdiction statute.[2]

In refusing to apply the *in pari materia* canon, the Seventh Circuit maintained that section 1348 and the former 12 U.S.C. § 94 should not be treated as *in pari materia* because, though they addressed similar *subject matters*, they did not serve similar legislative purposes. *See Firstar Bank*, 253 F.3d at 990 ("A number of cases have refused to apply the canon to laws superficially relating to similar subjects where a finer examination revealed that the purposes underlying the laws varied."). But the cases relied on by the *Firstar Bank* court did not address *identical terms* applied in *similar statutes* to the *same very specific subject matter*; instead, they addressed the interpretation of wholly distinct terms applied

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[2] In 1982, Congress amended the venue statute interpreted in *Bougas* to change the result of *Bougas*. *See* 12 U.S.C. § 94 (providing for venue only "within the district in which [a national bank's] principal place of business is located"). But the subsequent amendment of the venue statute does not change the fact that, in 1948, Congress adopted a consistent vocabulary to describe the geographic presence of national banking associations for the purposes of suit in federal courts. In general, subsequent amendment or repeal of a statute does not render it irrelevant to *in pari materia* analysis. *See, e.g.*, *Benner v. Wichman*, 874 P.2d 949, 957 n.18 (Alaska 1994); *see generally 2B Norman J. Singer, Sutherland's Statutes and Statutory Construction* § 51.04 (6th ed. 2000) (citing cases).

to distinctly different subjects. *See United States v. Granderson*, 511 U.S. 39, 50-51 (1994) (refusing to interpret "original sentence" in light of the use of "supervised release" in another statute, and rejecting the argument that "the discrete, *differently worded* probation and supervised release revocation provisions should be construed *in pari materia*" (emphasis added)); *Fort Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 647-48 (1990) (refusing to read "conditions of employment" in a labor statute to exclude wages just because other labor statutes dealing with *other subject matters* in "entirely different fields of employment" had listed wages separately from conditions of employment). In contrast, in the case of section 1348, Congress adopted a set of specific terms to refer to the same very specific subject matter, namely describing the physical presence of national banking associations to determine their capacity for and amenability to suit in federal courts. In such circumstances, application of the *in pari materia* canon reflects the judgment that Congress, like other rational speakers, uses words consistently when speaking about similar subjects, *regardless* of its generalized purposes. Therefore, the two statutes should be treated as *in pari materia* and the Supreme Court's interpretation of "located" in *Bougas* must control the meaning of the same term in section 1348.

In fashion similar to that of the Seventh Circuit, the dissent urges that the *in pari materia* canon should not apply because there are "significant meaningful distinctions" between the doctrine of venue and the provision for diversity jurisdiction. *Post* at 36. But in what amounts to a full concession of the applicability of the canon, the dissent admits that the *relevant* subject matters of the venue and diversity jurisdiction statutes are identical: as the dissent frankly acknowledges both "concern whether a national bank may initiate suit or be sued in federal court." *Id.* The further observation made by the dissent that venue serves litigants'

convenience while diversity jurisdiction is concerned with bias does not defeat the application of the canon. To permit it to do so would be to insist upon far too specific a congruity of purpose; no two statutes would ever be sufficiently similar to warrant application of the canon. And courts have never insisted on such absolute identity of purpose. *See, e.g., Simpson v. Union Oil Co.*, 377 U.S. 13, 24 (1964) (patent law and antitrust law are *in pari materia*); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, (6th Cir. 1966) ("The Federal Trade Commission Act may be construed *in pari materia* with the Sherman and Clayton Acts."); *Hallenbeck v. Penn. Mut. Life Ins. Co.*, 323 F.2d 566, 571 (4th Cir. 1963) ("It is well established that statutes which relate to the same persons or things, *or* the same class of persons or things, or have a common purpose may be regarded as 'in pari materia.'" (emphasis added)). Indeed, the very treatise that the dissent cites summarizes the criteria for applying the canon this way: "The guiding principle . . . is that if it is natural and reasonable to think that the understanding of members of the legislature or persons to be affected by a statute, be influenced by another statute, then a court called upon to construe the act in question should also allow its understanding to be similarly influenced." 2B *Sutherland's Statutory Construction* § 51.03, at 212. Here, of course, not only is it eminently "natural and reasonable" to think that Congress, in describing the presence of national banking associations to determine their capacity to sue and be sued in federal courts, would use the words "established" and "located" consistently in the two statutes; the opposite conclusion would be *un* natural and *un* reasonable.

Even if the two statutes are *not* treated as *in pari materia*, the meanings of "established" and "located" in the venue statute still provide highly persuasive evidence of the meanings of the same terms in the jurisdiction statute. *Identical* words, even occurring in *unrelated* statutes, should be interpreted to have identical meanings whenever reasonably possible. *See, e.g., Overstreet v. North Shore Corp.*, 318 U.S. 125, 129-30 (1943) (construing the phrase "engaged in commerce" in the Fair Labor Standards Act in light of existing constructions of the same phrase in the Federal Employers' Liability Act, without describing the two statutes as *in pari materia*); *Link v. City of Shelton*, 186 Conn. 623, 443 A.2d 902, 904 (1982) (construing the phrase "in the course of his duty" in the statute in question in light of the same phrase in the "unrelated" workers' compensation statute); *see generally* 2B *Sutherland's Statutory Construction* § 53:03, at 327-31.

Furthermore, even if we were to ignore *Bougas* and to adopt the dissent's suggestion that the diversity jurisdiction statute be interpreted in light of its "historical purpose," namely preventing bias against out-of-state parties, there is no reason to believe that this purpose would lead us to adopt the dissent's construction of section 1348. On the contrary, there is not a shred of evidence that Congress, in enacting section 1348, was concerned with shielding national banks from potential bias in the courts of the states where they operate branch offices. The only evidence that the dissent even offers is the fact that Congress, in 28 U.S.C. § 1332(c)(1), restricted the citizenship of corporations to the states of incorporation and of principal place of business. *See post* at 37 ("[T]he rationale underlying the concept of diversity jurisdiction led Congress to limit the states where a corporation may be deemed to possess citizenship [sic] . . . ."). But section 1332(c)(1) does not evidence that Congress had any universal concern with potential state-court bias against entities with a substantial business presence in a given state. Section 1332(c)(1) is more naturally viewed as evidence of Congress' desire to adopt a bright-line rule to govern the citizenship of corporations — or perhaps more appropriately, as evidence merely of corporations' lobbying clout. Moreover, as we discuss below, the divergent language of section 1348 suggests

that Congress did *not* intend to adopt the same rule in section 1348 as it adopted in section 1332(c)(1), *see infra*.

In short, even if we were to ignore the Supreme Court's construction of "located" and "established" in *Bougas*, the "rationale underlying the concept of diversity jurisdiction" would still provide no warrant to adopt the dissent's position. The notion that Congress believed that national banks that actively conduct business in a state cannot get a fair adjudication of state-law claims in that state's courts is rank speculation, as even the dissent would have to acknowledge. In fact, if one were to engage in surmise, it would be just as defensible to conclude that Congress believed it entirely reasonable in such circumstances to deny national banking associations resort to the federal courts, over the courts of the states in which the banks have chosen to locate branch offices; for it might have appeared unseemly to permit the national banks to seek and receive the trust and business of a state's citizens, but at the same time to permit them to refuse, out of distrust of those citizen-customers, to subject themselves to the courts created by those citizens to protect their rights against those who seek, receive, and breach their trust reposed. In all events, we certainly would not indulge the former inference as to congressional belief where there is absolutely no evidence of such belief and the language chosen by Congress all but confirms the contrary.

III.

Despite the ordinary meaning of section 1348 and its obvious analog in the venue statute interpreted in *Bougas*, Wachovia persists that "located" is nevertheless ambiguous. *See Appellant's Supp. Br.* at 1 ("[T]he word 'located' lacks any plain or unambiguous meaning when applied to the activities of national banks."); *see also Bougas*, 434 U.S. at 44 ("There is no enduring rigidity about the word 'located.'"). Wachovia argues that "located" in section 1348 must be interpreted to incorporate the settled background understanding of the

term. *See Appellant's Supp. Br.* at 3; *see also Firstar Bank*, 253 F.3d at 988.

As an initial matter, we do not believe that the term "located" in section 1348 is ambiguous between "physically present," and "principal place of business" or "principally physically present." We think the word simply means "physically present," especially in light of the Supreme Court's definitive construction of the former 12 U.S.C. § 94. But even if the meaning of the word were sufficiently indeterminate to justify consulting such extrinsic evidence, no proffered background understanding sheds any light on the meaning of "located" *as applied to branch offices*. No consistent statutory usage, no settled meaning in the case law, and no historical statutory purpose addressed the question whether "located" includes branch offices. This issue had never been "clarified by judicial construction" and had never reached any "established understanding" at the time of section 1348's enactment. *Firstar Bank*, 253 F.3d at 988.

A.

First, Congress did not rely on any settled background meaning other than the ordinary meaning of "located" when it enacted section 1348, because neither the federal banking statutes nor the cases interpreting them had established one. Wachovia concedes that Congress' use of "located" and its cognates to refer to national banking associations in federal statutes has been "far from uniform." *Appellant's Supp. Br.* at 1. In some sections of title 12, the context makes clear that "location" is being used in a specialized sense to refer only to charter location. *See, e.g.*, 12 U.S.C. § 52 (requiring the capital stock certificates of a national banking association to state "the name and location of the association"); 12 U.S.C. § 75 (providing for rescheduled annual shareholders' meetings when the meeting day "falls on a legal holiday in the State in which the bank is located"); 12 U.S.C. § 182 (requiring notice of intent to dissolve to be published "for a period

of two months in every issue of a newspaper published in the city or town in which the association is located"). In other sections, the context is clear that "located" is being used in its ordinary or natural sense, to include branch locations. *See, e.g.*, 12 U.S.C. § 36 (defining "branch" to include "any branch place of business located in any State"); 12 U.S.C. § 92 (authorizing any national bank "located and doing business in any place the population of which does not exceed five thousand inhabitants" to operate as an insurance agent). So the statutory usage of "located" does not establish any specialized meaning for the term apart from its ordinary meaning.

Neither did Congress rely on any settled background meaning of "located" in the case law. Apparently only one court considered the issue of branch locations under the 1887 Act prior to enactment of section 1348. *See Am. Sur. Co. v. Bank of Cal.*, 133 F.2d 160, 161-62 (9th Cir. 1943) (holding that a national bank is "located" only at its principal place of business under the 1887 Act, on analogy to the parallel rule for corporations). That one case is not enough to establish a settled background meaning upon which Congress necessarily implicitly relied in employing the word "located." And, as the Supreme Court noted in *Bougas*, courts disagreed widely about the meaning of "located" in the venue statute when they came to address the issue of branch banks. *See Bougas*, 434 U.S. at 39-41 (describing "three diverse interpretations" in state courts of the word "located" in the former section 94).

A line of cases prior to 1948 did interpret "located" to refer to *charter* location in the former venue statute. *See, e.g., Mfr.'s Nat'l Bank v. Baack*, 16 F. Cas. 671, 673 (C.C.S.D.N.Y. 1871) ("It is quite apparent, from all these statutory provisions, that congress [sic] regards a national banking association as being 'located' at the place specified in its organization certification."); *Raiola v. Los Angeles*

First Nat'l Trust & Savings Bank, 133 Misc. 630, 233 N.Y.S. 301, 302 (N.Y. City Ct. 1929) (relying on *Baack* to conclude that "[t]he location of a national banking association is the place specified in its organization certificate"); *Leonardi v. Chase Nat'l Bank*, 81 F.2d 19, 21-22 (2d Cir. 1936) (crediting *Baack* 's conclusion that "located" refers to charter location and holding that a bank is only "established" at its charter location, not at its *branch offices*). However, none of these cases confronted the question whether a bank is located at its branch offices. On the contrary, the *Baack* case, which provided the authority for the subsequent cases, was decided long before the McFadden Act, and so necessarily presupposed that charter location was the *only* candidate for "location." Thus *Baack* did not create an "established understanding" that "located" excludes branch offices; branch offices did not even exist at the time it was decided. Similarly, neither *Leonardi* nor *Raiola*, in relying on *Baack's* characterization of the venue statute, confronted the issue of whether a bank is "located" in those places in which it has branch offices.

It follows that there was no settled background understanding of "located" as it applied to branch offices prior to 1948. This is unsurprising of course, because interstate branch offices did not exist prior to 1933. *See supra*. The issue was very seldom raised, much less settled, in the fifteen years between the 1933 statute and the enactment of section 1348.

B.

Undeterred, Wachovia argues that section 1348 must be interpreted in light of a broad historical purpose, which Wachovia characterizes as the intent "to give national banks the same access to diversity jurisdiction as that enjoyed by state corporations and individual citizens generally." *Appellant's Supp. Br.* at 3; *see also Firstar Bank*, 253 F.3d at 988 ("Congress passed 28 U.S.C. § 1348 against an interpretive back-

ground which assumed that national banks were to have the same access to the federal courts as state banks and corporations.").

Wachovia points out that, prior to 1882, Congress had provided general federal question jurisdiction of all suits involving national banks. *Appellant's Supp. Br.* at 2 (citing *Petri v. Commercial Nat'l Bank of Chicago*, 142 U.S. 644, 648 (1892)). But Congress sought to reduce this broad access to the federal courts in statutes enacted in 1882 and 1887. The 1882 Act pared back the national banks' access to federal courts by purporting to place them on the same footing as state banks: "[J]urisdiction for suits hereafter brought by or against any [national banking association] . . . shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States . . . ." Act of July 12, 1882, ch. 290, § 4, 22 Stat. 162, 163 ("the 1882 Act"). Congress replaced this language in the 1887 Act by referring to jurisdictional parity with individual citizens, providing that national banks "shall, for the purposes of all actions by or against them . . . be deemed citizens of the states in which they are respectively located; and in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State." 24 Stat. at 554-55 (1887).

Wachovia argues that these two Acts established a settled background understanding, re-adopted by Congress in section 1348, that national banks should have the same jurisdictional access to federal courts as state banks and citizens. *Appellant's Supp. Br.* at 2; *see also Firstar Bank*, 253 F.3d at 993 ("'[L]ocated' should be construed to maintain jurisdictional equality between national banks and state banks or other corporations."). For support, Wachovia relies on statements in two Supreme Court cases commenting on the 1882 Act. *See Petri*, 142 U.S. at 649 (noting that, under the

1882 Act, national banks "were placed in the same category with banks not organized under the laws of the United States"); *Leather Mfr.'s Nat'l Bank v. Cooper*, 120 U.S. 778, 780 (1887) (describing the purpose of the 1882 Act as "to put national banks on the same footing as the banks of the state where they were located for all the purposes of [federal] jurisdiction"); *see also Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 566 (1963) ("Section 4 [of the 1882 and 1887 Acts] apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited."). On the basis of these generalizations, Wachovia would have us hold that "located" in section 1348 must be construed to exclude branch offices.

As an initial matter, we must observe that, though we are invited to interpret the word "located" in light of a supposed background principle of parity, we are confronted with several different formulations of that parity principle with no guidance on how to select among them. The 1882 Act required jurisdictional parity between national banks and *state banks*, and the *Cooper* Court commented that it was "intended to put national banks on the same footing as the banks of the state where they were located." *Cooper*, 120 U.S. at 780. In contrast, the 1887 Act required jurisdictional parity between national banks and *individual citizens*. Yet the *Petri* Court suggested that the 1887 Act established parity between national banks and "other corporations *and* individual citizens." *Petri*, 142 U.S. at 651 (emphasis added) (rejecting the argument that the 1887 Act stripped away *all* diversity jurisdiction of suits involving national banks). Here, Wachovia urges us to "give national banks the same access to diversity jurisdiction as that enjoyed by state corporations and individual citizens generally." *Appellant's Supp. Br.* at 3. And the Seventh Circuit called for "jurisdictional equality between national banks and state banks and other corporations."

Firstar Bank, 253 F.3d at 993. None of these formulations are equivalent. Moreover, even if we knew whether this elusive parity principle referred to individual citizens, state banks, state corporations, or all three, it would still be unclear whether that parity was fixed with reference to the jurisdictional access "enjoyed" by these entities *in 1948 when section 1348 was enacted*, or whether the word "located" in section 1348 must be interpreted to include an *evolving* reference to the jurisdictional access of state corporations *as Congress amends it over the years*, as the Seventh Circuit apparently believed. *See Firstar Bank*, 253 F.3d at 994 n.5 ("Interpreting 28 U.S.C. § 1348, the current version of which was promulgated in 1948, by referencing 28 U.S.C. § 1332(c)(1), *enacted ten years later in 1958*, might strike some as incongruous. However, the classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, *necessarily assumes that the implications of a statute may be altered by the implications of a later statute*." (emphases added) (internal quotation marks omitted) (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988))).

But even if we thought the statute was ambiguous enough to warrant consulting such abstract, judicially intuited purposes, and even if the abstract purpose urged upon us were sufficiently definite to provide clear guidance, we would reject Wachovia's historical argument for at least three reasons.

First, the Supreme Court's characterizations in *Petri* and *Cooper* rested on the *actual text* of the 1882 Act. The 1882 Act was couched in terms of jurisdictional parity between national banks and state banks. *See supra*. *But that text was repealed and replaced in 1887*. The 1887 Act described national banks' citizenship in the terms "located" and "established," while including a clarifying clause about jurisdictional parity between national banks and individual citizens. *See supra*. *But, in 1948, this parity language was*

also repealed and replaced with section 1348. Section 1348, in contrast to both the 1882 and the 1887 Acts, however, includes no reference to state banks, to corporations, or to individual citizens whatsoever. Wachovia, thus, would have us conclude that Congress, by progressively *eliminating* parity language from the jurisdictional statute in two subsequent amendments, was thereby *ratifying* an abstract parity principle that was directly expressed *only in the 1882 Act, fifty years prior to enactment of the statute we interpret*. This strikes us as a patently unreasonable interpretation.

Second, even if the 1882 and 1887 Acts could be read to establish a parity principle, and even if we believed that Congress adopted this parity principle in section 1348, it seems clear that any principle formulated in the 1880s would be *inapplicable or, at best, neutral* as to the issue before us, because interstate branch offices did not exist until 1933. Plainly, the parity guaranteed in the 1887 Act, namely parity between national banks and *individual citizens*, was neutral on the issue of branch offices, because individual citizens do not have anything analogous to branch offices. And the Congress that required parity with state banks in 1882 (which parity was *repealed* in 1887) was not confronted with the possibility that national banks would be conducting business in multiple states. The Supreme Court in *Bougas* made a similar observation on the 1864 predecessor to the former venue statute:

> It suffices to stress that Congress did not contemplate today's national banking system, replete with branches, when it formulated the 1864 Act; that there are no sure indicators of 1864 congressional intent with respect to a banking system that did not then exist; and that prior to 1927, and indeed, prior to 1933, Congress had no occasion whatsoever to be concerned with state-court venue other than at the place designated in the bank's charter.

Bougas, 434 U.S. at 43. Even if Wachovia were correct in arguing that "Congress impliedly consented to the Supreme Court's 'settled meaning' of the statute [in 1948]," *Appellant's Supp. Br.* at 3, it still could not be correct in arguing that such a "settled meaning" (derived from Supreme Court cases decided in 1887 and 1892) had anything to say about the yet-unforeseen issue of branch banking.

In other words, even if the parity principle(s) ascribed by the Supreme Court to Congress in the 1882 Act and the 1887 Act were somehow incorporated into the 1948 statute, any such principle would only guarantee that *national banks are subject to the rules of diversity jurisdiction*, instead of automatically triggering federal question jurisdiction. *See, e.g.*, *Petri*, 142 U.S. at 648 (noting that the purpose of the 1882 Act was to eliminate federal "arising under" jurisdiction for suits involving national banks). The 1882 and 1887 Acts put national banks on "parity" with state banks and corporations only in this limited sense, namely that the access of all three to the federal courts would now be determined by their *citizenship* in various states — rather than by the presence of a federal charter. *See Horton*, 387 F.3d at 433 (rejecting the argument that "this approach achieves the parity Congress intended: a state bank organized in Texas, being a Texas citizen, would not be able to invoke diversity jurisdiction in a suit against a Texas citizen; hence, a national bank located or doing business in Texas . . . should also not be able to invoke diversity jurisdiction against a Texas citizen"). Despite the dissent's extensive reliance on *Petri* and *Cooper*, nothing in these cases can be construed to require that the same rules regarding the technical qualifications for state citizenship must apply both to national banks and to corporations. Indeed, nothing in those cases *could be* construed to require such highly specific, permanently synchronized parity (in the face of statutory language to the contrary), because as the Supreme Court recognized in *Bougas*, no one envisioned in

1887 that a national bank could ever be a citizen of more than one state.[3] *See Bougas*, 434 U.S. at 43.

In fact, Wachovia, the dissent, the Fifth Circuit, and the Seventh Circuit all rely on the following language from *Petri* as critical evidence for their sweeping "principle of jurisdictional parity": "No reason is perceived why it should be held that congress [sic] intended [in the 1887 Act] that national banks should not resort to federal tribunals as other corporations and individual citizens might." *Petri*, 142 U.S. at 650-51. *See Appellant's Supp. Br.* at 2 (quoting this language); *post* at 435 (same); *Firstar Bank*, 253 F.3d at 986 (same); *Horton*, 387 F.3d at 433 & n.32 (same).[4] But, read in context, this language proves the very point we make here, because the *Petri* Court was addressing and rejecting the argument that the 1887 Act had *abolished diversity jurisdiction for national banks altogether*. *See Petri*, 142 U.S. at 649-50 ([I]t is contended that the federal courts cannot exercise the same jurisdiction in respect of national banks, by reason of diverse citizenship, as they possess in controversies

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[3] In rejecting a similar line of reasoning, the Fifth Circuit asserted in conclusory fashion that this argument "would lead to a narrow concept of 'parity.'" *Horton*, 387 F.3d at 433. Indeed it does. The reason to adopt such a "narrow concept of parity" is that it is the *only* concept of parity warranted by the historical materials. The Fifth Circuit adopted a broader concept of parity only by anachronistically imputing to the Congresses of 1882 and 1887 a definite intention on an issue that they could not possibly have envisioned.

[4] This language is critical because it is the only cited language from the contemporaneous Supreme Court that comments directly on the 1887 Act, which was the immediate predecessor to section 1348 and which included the word "located," rather than the 1882 Act, which did not include the word "located" and which was repealed in its entirety in 1887. The *Cooper* case exclusively addressed the 1882 Act, *see* 120 U.S. at 778-82.

between individual citizens of different states."). Therefore this language from the *Petri* Court, and the holding of the *Petri* case, established only the general conclusion that *federal courts could exercise diversity jurisdiction over national banks*, just as they do over corporations and individual citizens. This is the only "parity principle" in the *Petri* and *Cooper* cases, and it is unwarranted (not to mention anachronistic) to cite this language to support the considerably more specific conclusion that the identical *criteria of state citizenship* must apply to national banks and to corporations.

Precisely the same analysis applies to the language from the *Cooper* case quoted by Wachovia, the dissent, the Fifth Circuit, and the Seventh Circuit. The *Cooper* Court remarked that the 1882 Act "was evidently intended to put national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States." *Cooper*, 120 U.S. at 780; *see also Appellant's Supp. Br.* at 2 (quoting this language); *post* at 435 (same); *Firstar Bank*, 253 F.3d at 986 (same); *Horton*, 387 F.3d at 429 (same). But the issue that the *Cooper* Court addressed was whether *general federal question jurisdiction* for national banks had survived the enactment of the 1882 Act; its statement that the 1882 Act placed national banks "on the same footing" as state banks meant merely that the federal question jurisdiction previously enjoyed by national banks, but not by state banks, had indeed been abolished by the 1882 Act. *See Cooper*, 120 U.S. at 781 ("[S]o long as the act of 1882 was in force, nothing in the way of jurisdiction could be claimed by a national bank *because of the source of its incorporation* [*i.e.* its federal charter]. A national bank was by that statute placed before the law *in this respect* the same as a bank not organized under the laws of the United States." (emphases added)).

Likewise, precisely the same analysis *also* applies to the *Langdeau* case of 1963, quoted by Wachovia, the Fifth Circuit, the Seventh Circuit. In *Langdeau*, the Supreme Court commented as follows:

> [T]he 1882 Act and the 1887 Act were designed to overcome the effect of [prior statutes] which allowed national banks to sue and be sued in the federal district and circuit courts *solely because they were national banks, without regard to diversity*, amount in controversy or the existence of a federal question in the usual sense.

Langdeau, 371 U.S. at 565-66 (emphasis added). But Wachovia, the Fifth Circuit, and the Seventh Circuit all quote *only* the very next sentence from *Langdeau*, which reads as follows:

> Section 4 [of the 1882 and 1887 Acts] apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited.

Id. at 566; *see Appellant's Supp. Br.* at 3; *Firstar Bank*, 253 F.3d at 986; *Horton*, 387 F.3d at 430. By quoting this second sentence out of context, they misleadingly imply that *Langdeau* supports their interpretation, when in fact *Langdeau*, like *Petri* and *Cooper*, merely confirms that Congress' intent in the 1882 and 1887 Acts was to establish "parity" in the limited sense of abolishing automatic federal question jurisdiction for suits involving national banks.

Third, and perhaps most tellingly, if Congress desired to "maintain this parity" between national banks and corporations, *Firstar Bank*, 253 F.3d at 993, it is very surprising that Congress did not adopt similar language in section 1348 to the language it adopted soon afterward in section 1332(c)(1), enacted in 1958. Section 1332(c)(1) provides for dual citizenship of corporations, in the state of incorporation and at the principal place of business, without using the words "lo-

cated" or "established." *See* 28 U.S.C. § 1332(c)(1). Section 1348, by contrast, makes no such explicit provision for singular or dual citizenship. Interpreting the diversity jurisdiction statute governing national banks in light of the diversity jurisdiction statute governing corporations, as seems reasonable, we would conclude that Congress' use of *entirely different* language in the two reflects that it did *not* intend to adopt the same jurisdictional scheme for national banks as for corporations.

In sum, Wachovia's attempts to alter the ordinary meaning of "located" by invoking a "settled meaning" of the term decided prior to enactment are unconvincing. "Located" carried no settled background meaning in statutory usage or case law, and section 1348 did not adopt any preexisting "parity principle" that might illuminate its meaning here.

C.

Notwithstanding the evident weakness and transparent flaws in the Fifth and Seventh Circuit opinions, the dissent stands on these opinions, as well as the Ninth Circuit's 1943 opinion in *American Surety Co.*, which interpreted the language of the 1887 Act. *See post* at 435-40. If we believed that raw numbers were relevant, we would point out that the dissent fails to count the Second Circuit's recent observation, though not in holding, that favors our interpretation. *See World Trade Center Properties*, 345 F.3d at 161 ("Defendant Wells Fargo is a national bank . . . and by statute is deemed to be a citizen of every state in which it has offices." (citing 28 U.S.C. § 1348)). But questions of statutory interpretation are not decided by majority vote of the courts of appeals, and bare citations to decisions by other courts cannot substitute for analysis. *See McMellon v. United States*, 387 F.3d 329 (4th Cir. 2004) (en banc) (Luttig, J., dissenting) ("Judicial interpretation is not an exercise in poll-taking."). That our sister circuits may disagree with us in any given case is significant only insofar as their reasoning is persuasive. Here, that reasoning is simply unconvincing.

Because statutory interpretation must rest on analysis rather than a tally of judicial dispositions, the dissent's assertion that "prior to 1992, the 'unquestioned' and 'longstanding interpretation' was that 'located' did not include the branches of a national bank," is without significance. *Post* at 436 (alteration omitted) (quoting *Horton*, 387 F.3d at 428-29). But it is worth noting that, thus phrased, this observation is hardly ingenuous. No court challenged the dissent's construction of the term until 1992 only because there was no such construction available: the *first* case to address whether "located" in section 1348 included branch offices was the District of Rhode Island's 1992 opinion in *Iacono*, and that opinion construed the statute precisely as we do today. *See Conn. Nat'l Bank v. Iacono*, 785 F. Supp. 30, 31 (D.R.I. 1992) ("Whether a national banking association can also be deemed a citizen of the state in which its branch offices are 'located' is an issue that has rarely been discussed."). And the *Iacono* decision established the prevailing rule in the district courts prior to the Seventh Circuit's decision in *Firstar Bank* in 2001. *See Firstar Bank*, 253 F.3d at 985. Thus, the dissent's implication that our holding today departs from some settled weight of authority dating back to the enactment of section 1348 simply does not withstand scrutiny.

IV.

The word "located" in 28 U.S.C. § 1348 must be interpreted in accordance with its ordinary meaning of "physical presence." The Supreme Court's interpretation of the same word in a highly similar context in the *Bougas* case confirms the correctness of this construction. And no contrary background meaning is available counseling against this interpretation. Therefore, we hold that a national banking association is "located" under section 1348 in any state where it operates branch offices.

Because it is unsupported by statutory and historical analysis, the rival interpretation of the dissent and the Fifth and Seventh Circuits amounts to little more than judicial assertion of a policy preference in favor of federal forums for national banking associations. This policy may be preferable; indeed, Congress may ultimately adopt this policy by amending the statutory language, as it did to 12 U.S.C. § 94 in the aftermath of the Supreme Court's decision in *Bougas*. But our task is to interpret the language that Congress has actually enacted, not to anticipate what language it may enact in the future and judicially amend it accordingly. If the statute as written does not effectuate Congress' preference as to forum for such disputes as this, Congress may amend the statute. But for the courts to legislate such an amendment would be both to usurp the role of the legislature and to abdicate the role assigned to the judiciary. That which the Supreme Court of the United States observed in a directly analogous context fourteen years ago is strikingly fitting to our conclusion today:

> [A]ccommodating our diversity jurisdiction to the changing realities of commercial organization . . . is not only performed more legitimately by Congress than by courts, but it is performed more intelligently by legislation than by interpretation of the statutory word 'citizen.' . . . We have long since decided that, having established special treatment for corporations, we will leave the rest to Congress; we adhere to that decision.

Carden v. Arkoma Assocs., 494 U.S. 185, 197 (1990).

Because both Wachovia and Schmidt are citizens of South Carolina, the judgment of the district court is vacated. The case is remanded with instructions to the district court to dismiss for lack of federal jurisdiction.

VACATED AND REMANDED

KING, Circuit Judge, dissenting:

I write separately because I disagree with the panel majority's reading of § 1348 of Title 28. As explained below, I have concluded that proper application of the term "located" in § 1348 means that diversity jurisdiction exists in this dispute. As a result, I must respectfully dissent.

Section 1332(a)(1) of Title 28 provides the district courts with original jurisdiction over suits between citizens of different states involving more than $75,000. As the majority recognizes, Wachovia's citizenship, and thus the presence of federal court jurisdiction, turns on the meaning of "located" in § 1348 (providing that national banks are "citizens of the States in which they are respectively located"). In this case, the defendants are citizens of South Carolina; plaintiff Wachovia is, pursuant to § 1348, located in North Carolina; and federal court jurisdiction is thus present.

As explained herein, the majority's conclusion that the term "located" also includes Wachovia's branch offices in South Carolina is incorrect for at least two reasons. First, as it is used in § 1348, "located" is an ambiguous term, implicating congressional intent. Congress has never sought or intended to relegate disputes involving national banks to the state courts. It has, on the contrary, consistently intended to provide national banks with the same access to the federal courts as that accorded other banks and corporations. And the Supreme Court has recognized and enforced congressional intent on this point. Second, I disagree with the view that the Court's decision in *Citizens & Southern National Bank v. Bougas*, 434 U.S. 35 (1977) — construing the term "located" as it was used in a separate statute, 12 U.S.C. § 94 — controls our resolution of this issue.

I.

In construing an enactment of Congress, a court is to utilize two steps of analysis. *See Newport News Shipbldg. &*

Dry Dock Co. v. Brown, 376 F.3d 245, 248 (4th Cir. 2004). First, a reviewing court must assess whether the statutory term being construed is plain or ambiguous. If the term is unambiguous, the court simply applies the term's plain meaning. If the term is ambiguous, however, the reviewing court must take a second step and seek to determine the construction intended by Congress. *See id.* In this dispute, the term "located," as found in § 1348, is ambiguous, and Congress intended for that term to refer to Wachovia's principal place of business in North Carolina. My dissenting view on this issue is supported by the history of § 1348 and its statutory predecessors, by Supreme Court precedent, and by decisions of the courts of appeals that have addressed the meaning of "located" in the context of federal court jurisdiction.[1]

A.

We are obliged first to assess whether the pertinent provision of § 1348 " 'has a plain and unambiguous meaning' " in this proceeding. *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 367 F.3d 245, 250 (4th Cir. 2004) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). If "a statute speaks with clarity to an issue," then its meaning is plain and there is no need for further judicial inquiry. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *see also S.C. Dep't of Health & Envtl. Control v. Commerce & Indus. Ins. Co.*, 372 F.3d 245, 255 (4th Cir. 2004). By contrast, a statutory term must be deemed ambiguous, if, when examined in context, it is susceptible to more than one reasonable interpretation. *Wilson*, 367 F.3d at 248. If such an ambiguity is apparent, we must

[1] *See Horton v. Bank One, N.A.*, 387 F.3d 426 (5th Cir. 2004); *Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001); *Am. Surety Co. v. Bank of Cal.*, 133 F.2d 160 (9th Cir. 1943).

then ascertain the " 'interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.'" *Comm'r v. Engle*, 464 U.S. 206, 217 (1984) (quoting *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part)).

Put most simply, I part company with the panel majority on its view that "located" is an unambiguous statutory term. Under the accepted definitions of "locate," the term refers to a particular or specific position, rather than to a general physical presence. *See, e.g.*, *Black's Law Dictionary* 958 (8th ed. 2004) (defining "location" as "[t]he specific place or position of a person or thing"); *Webster's Third New International Dictionary* 1327 (reprint 1993) (1981) (defining "locate" as "to set or establish in a particular spot or position").[2] In this proceeding, "located" could refer either to Wachovia's principal place of business (North Carolina), to the place named in its certificate of organization (North Carolina), or to any state in which Wachovia has established branch offices (such as South Carolina). As the majority observes, the *Bougas* Court recognized such an ambiguity in how the term "located" was used in § 94 of Title 12, a separate statute addressing state court venue for proceedings involving national

[2] Previous versions of these sources, and other sources as well, affirm the proposition that "locate" refers to a particular or specific position. See *Black's Law Dictionary* 1089 (4th ed. 1968) (defining "location" as "[s]ite or place"); 8 *The Oxford English Dictionary* 1081 (reprint 2004) (2d ed. 1989) (defining "locate" as "[t]o fix or establish in a place"). Only one definition emphasizes "located" as being related to physical presence. *See Black's Law Dictionary* 940 (6th ed. 1990) (defining "located" as "[h]aving physical presence or existence in a place").

banks.[3] Significantly, the Court there observed that "[t]here is no enduring rigidity about the word 'located,'" *Bougas*, 434 U.S. at 44, and it pronounced the term to be ambiguous. As a result, the Court proceeded to the second step of statutory construction and assessed the concerns Congress had sought to address in its adoption of § 94. *Bougas*, 434 U.S. at 44. We must do likewise.

B.

The relevant history of our national banks reveals that Congress intended for such banks to enjoy the same access to federal courts as that accorded other banks and corporations. When Congress first authorized the creation of national banks in 1863, it provided that suits by and against them could be initiated in the federal courts. *See* Act of Feb. 25, 1863, ch. 58, 12 Stat. 665, 681. In 1882, Congress amended its 1863 enactment to eliminate automatic federal question jurisdiction over all disputes involving national banks. *See Leather Mfrs.' Bank v. Cooper*, 120 U.S. 778, 780-81 (1887). Nonetheless, the amendment provided plainly that jurisdiction over lawsuits involving national banks "shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States . . . ." Act of July 12, 1882, ch. 290, 22 Stat. 162, 163. The Court promptly construed this amendment to place "national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States." *Leather Mfrs.' Bank*,

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[3] The Court's *Bougas* decision only addressed the meaning of 12 U.S.C. § 94, which then provided that actions against national banks may be brought in any district court "within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said [national bank] is located having jurisdiction in similar cases." *Bougas*, 434 U.S. at 35-36 (quoting 12 U.S.C. § 94).

120 U.S. at 780; *see also Petri v. Commercial Nat'l Bank of Chi.*, 142 U.S. 644, 649 (1892) (observing that 1882 amendment "placed [national banks] in the same category with banks not organized under the laws of the United States").

In 1887, Congress revised the jurisdictional statute to include the language that we must assess today. *See* Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, 554 (providing that "all national banking associations . . . shall . . . be deemed citizens of the States in which they are respectively located"). The 1887 enactment also provided that, "in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State." *Id.* at 554-55. In assessing this statutory revision, the Court again recognized and applied the clear intent of Congress that national banks be accorded equal access to the federal courts. *See Petri*, 142 U.S. at 650-51 ("No reason is perceived why it should be held that congress intended that national banks should not resort to federal tribunals as other corporations and individual citizens might."); *Fin. Software Sys., Inc. v. First Union Nat'l Bank*, 84 F. Supp. 2d 594, 600 (E.D. Pa. 1999) (recognizing that the 1887 act changed the structure of the 1882, but it "did not change the purpose"). In 1948, when the national bank jurisdictional statute was codified as the present § 1348, Congress left fully intact its provision that national banks are "citizens of the States in which they are respectively located." *See* 28 U.S.C. § 1348.

As this historical review reflects, the Court has viewed § 1348 as according national banks the same access to the federal courts as that enjoyed by state banks and corporations. Significantly, Congress has never altered the pertinent statutory language, although it has repeatedly revised other

aspects of the jurisdictional statute.[4] In my view, Congress has thereby, in each of these enactments, manifested its intent to sanction applicable judicial and administrative interpretations of the statute. *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates . . . the intent to incorporate its administrative and judicial interpretations as well.").

C.

Three of our sister courts of appeals have faced the very issue posed to us today, and I agree with their decisions construing the term "located" in § 1348 to provide national banks the same access to the federal courts as that accorded other banks and corporations.[5] Most recently, the Fifth Cir-

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[4] For example, in adopting the Judicial Code of 1911, Congress altered the structure of the jurisdictional provision of the 1887 act, while retaining *in haec verba* its language regarding citizenship. *Horton*, 387 F.3d at 431. This structural revision was obviously designed "to make the purpose of the reenacted statute clearer . . . ." *Herrmann v. Edwards*, 238 U.S. 107, 117 (1915).

[5] The Second Circuit has recently indicated that, pursuant to § 1348, a national bank should be deemed "a citizen of every state in which it has offices." *World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 161 (2d Cir. 2003). Needless to say, I am unpersuaded by this dicta. As I read it, the decision upon which that panel relied — *United Republic Ins. Co. in Receivership v. Chase Manhattan Bank*, 315 F.3d 168, 169 (2d Cir. 2003) (per curiam) — did not *hold* that "located" includes a national bank's branch offices; it simply remanded for an assessment of citizenship. Indeed, the only court in the Second Circuit to directly address the issue viewed the language of *World Trade Center Properties* as "dicta" and as not controlling. *See RDC Funding Corp. v. Wachovia Bank, N.A.*, No. 3:03CV1360, 2004 WL

cuit, in its decision in *Horton v. Bank One, N.A.*, agreed with this very proposition. 387 F.3d at 436 (5th Cir. 2004) (holding that the definition of "located," as used in § 1348, is limited to a "national bank's principal place of business and the state listed in its organization certificate and its articles of association"). In so ruling, the court recognized that "[b]ecause section 1348 does not have any language modifying or rejecting the interpretive understanding that came with its predecessors, this court should presume that Congress intended to retain and incorporate the existing interpretive backdrop." *Id.* at 431. Similarly, the Seventh Circuit, in its *Firstar Bank, N.A. v. Faul* decision of 2001, adhered to the same principle, relying on the established presumption that "Congress will use clear language if it intends to alter an established understanding about what a law means; if Congress fails to do so, courts presume that the new statute has the same effect as the older version." 253 F.3d 982, 988 (7th Cir. 2001); *see also Am. Surety Co. v. Bank of Cal.*, 133 F.2d 160, 162 (9th Cir. 1943) (explaining that, if Congress had intended to provide that national bank should be deemed citizen of states where branch offices are operated, "it would be a noteworthy departure from the general rule, and more likely than not Congress would have plainly state[d] such intent").[6] In fact, as the *Horton* court recognized, "[p]rior to 1992, the 'unquestioned' and 'longstanding interpretation' was that 'located' did *not* include the branches of a national bank." 387 F.3d at 428-29 (emphasis in original) (quoting *Baker v. First Am. Nat'l Bank*, 111 F. Supp. 2d 799, 800 (W.D. La.

717111, at *2 n.6 (D. Conn. March 31, 2004). That court agreed with my take on this question. *See id.* at *6.

[6] In *American Surety Co.*, the court was called upon to construe the term "located" as found in 28 U.S.C. § 41, the predecessor of § 1348.

2000)).[7] The Comptroller of the Currency has also endorsed this view. *See* O.C.C. Interpretive Letter No. 952, 2003 WL 23221430, at *4 (O.C.C. June 2003) ("National banks are to be treated for diversity jurisdiction purposes in a manner similar to state banks."). As the *Faul* court has aptly explained, for sixty years leading up to the 1948 codification of § 1348, the term "located" was construed to mean that national banks would enjoy parity with state banks and corporations, and we must presume that Congress intended for that construction to continue. *See* 253 F.3d at 988.[8] And as the court appropriately observed, nothing "in the statute rebuts this presumption." *Id.* at 988-89 (contrasting 1882 enact-

[7] The district courts to have confronted this issue since the Seventh Circuit's decision in *Faul* have all agreed with that court's holding, including a court in this circuit. *Compare MBIA Ins. Corp. v. Royal Indem. Co.*, 294 F. Supp. 2d 606 (D. Del. 2003), *Pitts v. First Union Nat'l Bank*, 217 F. Supp. 2d 629 (D. Md. 2002), *Bank One, N.A. v. Euro-Alamo Invs., Inc.*, 211 F. Supp. 2d 808 (N.D. Tex. 2002), *Baker v. First Am. Nat'l Bank*, 111 F. Supp. 2d 799 (W.D. La. 2000), *and Fin. Software Sys., Inc. v. First Union Nat'l Bank*, 84 F. Supp. 2d 594 (E.D. Pa. 1999) (holding that national bank is citizen of state of its principal place of business and not citizen of any other state where it has branch), *with Ferraiolo Constr., Inc. v. Keybank, N.A.*, 978 F. Supp. 23 (D. Me. 1997), *Norwest Bank Minn., N.A. v. Patton*, 924 F. Supp. 114 (D. Colo. 1996), *Bank of N.Y. v. Bank of Am.*, 861 F. Supp. 225 (S.D.N.Y. 1994), *and Conn. Nat'l Bank v. Iacono*, 785 F. Supp. 30 (D.R.I. 1992) (agreeing that national bank has citizenship in every state where it has branch).

[8] Because a corporation is a citizen of both the state in which it is incorporated and the state in which it maintains its principal place of business, a national bank, to be treated similarly, should be a citizen of the state of its principal place of business and the state named in its organizational certificate. *Horton*, 387 F.3d at 436; *Faul*, 253 F.3d at 994.

ment, which explicitly declared that national banks no longer enjoyed federal jurisdiction based on their federal status).[9] Adhering to this reasoning, Judge Higginbotham, in writing for the *Horton* court, similarly concluded that "we should read section 1348 as retaining its objective of jurisdictional parity for national banks vis-a-vis state banks and corporations." 387 F.3d at 431.

II.

Notwithstanding the foregoing, the panel majority has concluded that the Court's decision in *Citizens & Southern National Bank v. Bougas*, 434 U.S. 35 (1977), is controlling here. With respect, three compelling reasons serve to undercut the majority's reliance on *Bougas*. First, the *Bougas* Court confined its ruling to the state court venue provision of 12 U.S.C. § 94, declaring that it was not deciding an issue of venue — much less jurisdiction — in the federal courts. Second, the *in pari materia* canon of statutory construction does not dictate how we should construe "located" because § 94 does not address the same subject as § 1348. Third, the canon of construction that different words within the same statute should, if possible, be assigned different meanings, does not preclude "located" from meaning Wachovia's principal place of business.

[9] The only district court in this circuit to have faced the question of how the term "located" in § 1348 should be construed followed the *Faul* court's "reasoning and analysis." *See Pitts v. First Union Nat'l Bank*, 217 F. Supp. 2d 629, 631 (D. Md. 2002). In so doing, Judge Nickerson recognized that " 'located' should be construed to maintain jurisdictional equality between national banks and state banks or other corporations." *Id.* (quoting *Faul*, 253 F.3d at 993-94) (internal quotation marks omitted)).

A.

First of all, in rendering its decision in *Bougas*, the Court was assessing the congressional use of the term "located" in another statute, and its reasoning does not bind us. The *Bougas* appeal involved an issue of state court venue only, and the Court, in explaining its holding, carefully recognized that venue doctrines are primarily concerned with the convenience of the parties. In so doing, the Court concluded that, in the modern age, authorizing venue as present in a place where a national bank operates a branch office would not be unduly burdensome. *Bougas*, 434 U.S. at 44 & n. 10. Although the Court recognized that § 1348 also contains the term "located," *id.* at 36 n. 1, this singular reference was, as the *Horton* court aptly observed, merely pointed out by the *Bougas* Court "in a footnote, with no further comment . . . ." *Horton*, 387 F.3d at 433. Moreover, the *Bougas* Court's holding was confined to § 94 only, and the Court explicitly declared that it was not addressing any issue of venue in the federal courts. 434 U.S. at 39 (referencing 12 U.S.C. § 94). In these circumstances, the Court did not implicitly reverse its long-standing precedent concerning federal court jurisdiction involving national banks.

B.

Second, the *in pari materia* canon of statutory construction does not compel us to construe "located," as found in § 1348, in the same manner as the Court construed § 94 in *Bougas*. Of course, statutes *in pari materia* — or pertaining to the same subject matter — should be construed "as if they were one law." *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (internal citation and quotation marks omitted). This canon is only applicable, however, when the statutes address the same subject. *See Faul*, 253 F.3d at 990; 2B Norman J. Singer, *Sutherland Statutory Construction* § 51.03, at 138 (6th ed. 2004) (stating that "where the same subject is treated in several acts having different objects the

statutes are not in pari materia"). While the doctrines of both venue and jurisdiction concern whether a national bank may initiate suit or be sued in federal court, there are significant meaningful distinctions between them. *See Neirbo Co. v. Bethlehem Shipbldg. Corp.*, 308 U.S. 165, 168 (1939) ("This basic difference between the court's power and the litigant's convenience is historic in the federal courts.").[10] Put simply, venue provisions address the convenience of the parties, and they are designed to minimize the cost of obtaining a court's judgment. *Id.* at 990-91. Hence, the *Bougas* decision was premised on its conclusion that, with respect to state court proceedings, authorizing venue to lie in any county where a national bank operates a branch office, as opposed to the county of bank's incorporation, would not unduly inconvenience the party litigants. *See Bougas*, 434 U.S. at 44 (observing that "[w]hat Congress was concerned with [in § 94] was the untoward interruption of a national bank's business that might result from compelled production of bank records for *distant* litigation") (emphasis added); *see also Faul*, 253 F.3d at 989-90.

Diversity jurisdiction, on the other hand, does not implicate any issue of convenience to the parties. Its principal purpose is to minimize potential bias against out-of-state parties. *Guar. Trust Co. v. York*, 326 U.S. 99, 111 (1945) ("Diversity jurisdiction is founded on assurance to nonresident litigants of courts free from susceptibility to potential local bias."); *Ziady v. Curley*, 396 F.2d 873, 875 (4th Cir. 1968) (recognizing that "one of the principal purposes of diversity jurisdiction was to give a citizen of one state access to an unbiased court to protect him from parochialism if he was

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[10] As the *Horton* and *Faul* courts have emphasized, § 94 was enacted in 1864 as part of the National Banking Act, while § 1348 was adopted in 1948 as part of the Judiciary and Judicial Procedure Act. *See Horton*, 387 F.3d at 433; *Faul*, 253 F.3d at 990.

forced into litigation in another state in which he was a stranger and of which his opponent was a citizen"). As Chief Judge Flaum explained in *Faul*, "while venue provisions minimize the cost of obtaining a court's judgment without regard to what that judgment might be, diversity jurisdiction seeks to ensure a correct decision, in the sense of being rendered on the merits of the parties' case rather than because of prejudice against a foreigner." 253 F.3d at 991. The *Faul* court thus properly concluded that "the affirmative reasons offered for the [*Bougas*] court's holding have no applicability to questions of jurisdiction [,]" because "reductions in the cost of litigating do not justify separating national banks from all other corporations so as to deny them federal diversity jurisdiction . . . ." *Id.* at 989-90.

Indeed, the rationale underlying the concept of diversity jurisdiction led Congress to limit the states where a corporation may be deemed to possess citizenship, providing that a corporation is "a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ." 28 U.S.C. § 1332(c)(1). And, as the Court has long recognized, national banks and corporations should be treated on the same basis for jurisdictional purposes. *See Mercantile Nat'l Bank at Dallas v. Langdeau*, 371 U.S. 555, 566 (1963); *Petri*, 142 U.S. at 650-51; *Leather Mfrs.' Bank*, 120 U.S. at 780.

C.

Finally, though different terms used in the same statute should be assigned different meanings whenever possible, this principle of construction does not dictate our resolution of this jurisdictional dispute. Section 1348 utilizes two terms — "established" and "located" — to refer to the presence of a bank. As a result, the majority reads the term "established" to refer to a bank's charter location, and it reads "located" to refer to a bank's physical presence in general, concluding that "if Congress wishes to specify *principal* place of business and thereby exclude branch locations, it can easily do so." *Ante* at 421 (emphasis in original). In the 1880s, when these terms first appeared in the national bank jurisdictional statute, such banks were not authorized to engage in branch banking. Consequently, as the *Horton* court recognized, the terms " 'established' and 'located' would have been functionally equivalent for jurisdictional purposes" because a national bank was both "established" and "located" in the place specified in its certificate of organization. 387 F.3d at 434. After branch banking was legalized in 1927 and expanded in 1933, Congress amended the jurisdictional statute several times, leaving the location language intact. Although different ways of being "located" were possible when Congress codified the statute in 1948, I see no basis for concluding that Congress intended for § 1348 to reflect some new reality,[11] nor has any other court supported such an approach.[12]

In my view, it is more compelling to conclude that Congress, in 1948, intended to ratify the Supreme Court's earlier rulings, and thus to construe "located" to include only a national bank's principal place of business. *See Bragdon*, 524 U.S. at 645. Indeed, as the *Faul* court observed, "the canon that different words in the same statute should be given different meanings can be complied with by considering 'established' as referring only to the place specified in the bank's

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[11] For support for its position, the majority asserts that in 1948 Congress was aware that branch banking was possible, "having effected the change itself." *Ante* at 421. However, there is no indication that Congress intended the advent of branch banking to change the definition of "located" and to deviate from its settled precedent of according national banks access to the federal court.

[12] The district courts that have construed the term "located" in § 1348 to include branch offices, *see supra* note 6, relied principally on the *Bougas* construction of 12 U.S.C. § 94.

charter, while giving 'located' a meaning that includes a bank's principal place of business." 253 F.3d at 992.

III.

Pursuant to the foregoing, diversity jurisdiction is present here, and our creation of a circuit split on this issue is unwarranted. Because the majority has unjustifiably circumscribed federal court jurisdiction of disputes involving national banks, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

WACHOVIA BANK, NATIONAL ASSOCIATION,
Plaintiff,

vs.

DANIEL G. SCHMIDT; PRIAG, L.L.C.; and
DGS INVESTMENTS, INC.,
Defendants.

CA No. 6:03-2005-20

Filed: August 1, 2003
Entered: August 4, 2003

ORDER

This matter is before the court on Wachovia Bank, National Association's ("Wachovia") petition for an order of arbitration and motion to compel arbitration. After review, the court denies Wachovia's petition and motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Wachovia's petition and motion derive from a lawsuit presently pending in South Carolina state court involving Daniel G. Schmidt ("Schmidt"), Priag, L.L.C. ("Priag"), and DGC Investments, Inc. ("DGC") (collectively "the defendants")[1] versus Wachovia, KPMG L.L.C. ("KPMG"), and others. The state case involves the defendants' allegations that they were fraudulently induced by Wachovia f/k/a First Union National Bank, KPMG, and others to invest in a tax strategy devised by KPMG and marketed and sold by Wa-

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[1] Priag is a South Carolina company. (Pl.'s Pet. Arbitration Ex. A.) Schmidt owns ninety-eight (98) percent of Priag, while DGC owns the remaining two percent. (*Id.*)

chovia. (P1.'s Pet. Arbitration Ex A.) Specifically, the defendants allege that Wachovia, KPMG, and others falsely represented that the tax strategy was a "clean deal," "never audited," and strictly complied with the United States Internal Revenue Service's ("IRS") rules and regulations. (*Id.*) In addition, the defendants allege that at some point, they received a tax opinion letter which falsely stated that the tax strategy was legal. (*Id.*)

Upon agreeing to participate in the investment tax strategy, the defendants formalized their relationship with Wachovia by signing an engagement letter and paying a one hundred thousand dollar ($100,000.00) fee for Wachovia's financial services. (*Id.*) In addition, in order to fund their investment in the tax strategy, the defendants entered into a separate arrangement with Wachovia in which they borrowed three million five hundred thousand dollars ($3,500,000.00). (Pl.'s Mem. Supp. Mot. Compel Arbitration Ex. A.) In exchange for the loan, the defendants signed a promissory note which contained an arbitration provision. (*Id.*) The loan was used to pay fees that arose from the defendants' participation in the tax strategy, as well as to purchase a warrant for the purchase of stock from Sandpiper Capital, Inc. ("Sandpiper"). (*Id.* Ex. B, C.) The warrant also contained an arbitration provision. (Def.'s Mem. Opp'n Pet. Arbitration Ex. 3.)

In 2001, the defendants' investment began to collapse as the IRS began investigating KPMG's tax strategy. (Pl.'s Pet. Arbitration Ex. A.) Eventually, in 2002 the IRS instituted an audit of the defendants' tax returns for the years 1998 to 2001. (*Id.*) As a result of the IRS audit, the defendants paid substantial fees and will be required to repay taxes in excess of three million dollars ($3,000,000.00) plus interest and penalties. (*Id.*) Subsequently, as stated earlier, the defendants brought suit in the Greenville County Court of Common Pleas against Wachovia, KPMG, and others alleging a violation of the South Carolina Unfair Trade Practices Act

("SCUTPA"), S.C. Code Ann. § 39-5-10, et seq., as well as state common law claims for civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, negligence, fraud, constructive fraud, negligent misrepresentation, promissory estoppel, breach of fiduciary duties, and aiding and abetting a breach of fiduciary duty. In the state lawsuit, the defendants seek monetary as well as injunctive relief. Subsequently, based on the arbitration provisions in the promissory note and the warrant, Wachovia filed the instant petition for an order of arbitration and motion to compel arbitration. The defendants responded and ask the court to deny Wachovia's petition and motion.

II. Discussion of the Law

The parties agree that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., applies to the promissory note and warrant in this case and the promissory note and warrant contain valid, binding arbitration provisions. Wachovia asserts that pursuant to section one of the FAA it is entitled to an order compelling arbitration. "The [FAA] applies to contracts `evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract." *Long v. Silver*, 248 F.3d 309, 315 (4th Cir. 2001) (quoting 9 U.S.C. § 2). In addition, the Supreme Court has announced a strong federal policy favoring arbitration. *See id.* at 316 (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

"To that end, the heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Id.* However, it is important to note that arbitration is voluntary, therefore "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). In consideration of the above, the United States Court of Appeals for the

Fourth Circuit held that "the governing standard for determining the arbitrability of [claims] is whether [the claims] have a significant relationship" to the agreement containing the arbitration clause. *Long*, 248 F.3d at 316-17.

A. Promissory Note

Wachovia argues that the arbitration clause in the defendants' promissory note covers the state court conflict between Wachovia and the defendants. Specifically, Wachovia asserts that the promissory note is significantly related to the defendants' state court claims because the money Wachovia lent the defendants in exchange for the promissory note was used to fund the defendants' participation in the investment tax strategy. In opposition, the defendants argue that their action against Wachovia is based on the engagement letter, which does not contain an arbitration clause and makes no mention of a loan.

In support of its position, Wachovia argues that the court should follow the decisions in *Long, Cara's Notions, Inc. v. Hallmark Cards, Inc.*, 140 F.3d 566 (4th Cir. 1998), and *J.J. Ryan, & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988), because they are factually similar to the instant petition. In *Long* the court was faced with determining whether a 1972 and a 1999 agreement were significantly related to the plaintiff' claims so as to be covered by the arbitration clauses contained in those two agreements. *See Long*, 248 F.3d at 313. The 1972 agreement was a shareholder and employment agreement. *See id.* The 1999 agreement was a shareholder agreement. *See id.* The plaintiff asserted that he was promised that if he signed the 1999 agreement he would be employed by the company until he was seventy (70) years old. *See id.* Despite this promise, the plaintiff was fired six months after he signed the 1999 agreement. *See id.* at 313-14. As a result, the plaintiff filed suit asserting claims against the shareholders or "frustrat[ing] his reasonable expectations as a shareholder and an employee," breach of fiduciary duty,

breach of contract, failure to distribute profits proportionately, fraud, civil conspiracy, unfair and deceptive trade practices, and punitive damages, as well as a shareholder derivative action. *See id.* at 317-19. After consideration, the court concluded that the claims either arose from the contracts themselves, were based on the plaintiffs status as a shareholder, or were based on actions surrounding the agreements. *Long*, 248 F.3d at 317-19. Based on those conclusions, the court found that arbitration was warranted. *See id.* at 319.

In *Cara's Notions* the plaintiff owned two Hallmark stores. *See* 140 F.3d at 568. Upon acquiring the first store, Hallmark and the plaintiff entered into a "Trademark Licensing Agreement." *See id.* Upon acquiring the second store, Hallmark and plaintiff entered into a "Hallmark Account Agreement." *See id.* Thereafter, the plaintiffs were informed by their landlord that they would have to vacate the store one property at the end of the lease. *See id.* The plaintiffs found a new location, but Hallmark disapproved of the location. *See id.* However, unbeknownst to the plaintiffs, Hallmark leased the property at the new location for itself. *See id.* As a result, the plaintiffs fled suit alleging breach of fiduciary duty, deceptive trade practices, usurping a business opportunity, and misrepresentation. *See Cara's Notions*, 140 F.3d at 568. Hallmark then moved to compel arbitration based on the arbitration clause contained in the "Hallmark Account Agreement." *See id.* The plaintiff argued that the arbitration clause in that agreement was inapplicable because the agreement only applied to the second store. *See id.* at 569. Concluding that the agreement could be read to apply to both stores and that the plaintiffs were sophisticated business people who should have understood the scope of the agreement, the court ordered arbitration. *See id.* at 571.

In *J.J. Ryan* the plaintiff was an importer and distributor of the defendant's affiliates' products. *See* 863 F.2d at 316.

The plaintiff entered into a distribution agreement with each affiliate. *See id.* Each distribution agreement contained an arbitration clause. *See id.* at 316-17. Sometime later, wanting to have its affiliates distribute their own products, the defendant offered to purchase the plaintiff. *See id.* at 317. The parties could not agree on a price, and the negotiations broke down. *See id.* The plaintiff alleged that thereafter the defendant threatened to cancel the distribution agreements if the plaintiff did not accept its price. *See id.* As a result, the plaintiff brought suit alleging unfair and deceptive trade practices, interference with contractual relations, conversion in violation of the Uniform Commercial Code, abuse of process, and defamation. *See J.J. Ryan*, 863 F.2d at 319-20. Subsequently, the defendant filed a motion to compel arbitration. *See id.* at 320. In opposition to the motion to compel arbitration, the plaintiff argued that its claims arose out of agreements separate from the distribution agreement, and therefore were not arbitrable. *See id.* at 319. The separate agreements did not contain arbitration clauses. *See Id.* After consideration, the court found that the separate agreements implemented the primary distribution agreements, and therefore any claim arising from the separate agreements arose from the distribution agreements. *See id.* Therefore, pursuant to the arbitration clauses contained in the distribution agreements, the court ordered arbitration. *See id.* at 320.

After consideration, the court disagrees with Wachovia's assertion that the instant action is factually similar to the above-discussed cases. In those cases, the courts concluded that the plaintiffs' claims arose out of the relationship created by the agreement containing the arbitration clause. In this case, the actions giving rise to the instant lawsuit arose from the relationship between the defendants and Wachovia as it is defined by the engagement letter. While the court recognizes that the loan is part of the facts surrounding the state court claims, the promissory note is simply ancillary to the actions

giving rise to the defendants' claims. In fact, the defendants satisfied the promissory note within the period of time provided in the promissory note, (Def.'s Mem. Opp'n Arbitration at 4; P1.'s Mem. Reply Def s Mem. Opp'n Arbitration at 3), and the defendants make no claim against Wachovia for the loan proceeds. (Pl.'s Pet Arbitration Ex. A.)

Additionally, a thorough review of the facts underlying the defendants' state law claims against Wachovia reveals that the claims are not significantly related to the promissory note. Count One of the defendants' state law complaint alleges that Wachovia was part of a civil conspiracy to lure investors into a tax strategy which the defendants to that lawsuit knew was contrary to law for the purpose of obtaining and retaining the investor's fees. (Pl.'s Pet. Arbitration Ex. A.) The defendants further allege that Wachovia's involvement consisted of the marketing of the tax strategy and its financial services. (*Id.*) The underlying facts of this claim bear no significant relationship to the promissory note.

Count Five, Six, and Seven of the defendants' state court complaint allege, respectively, fraud, constructive fraud, and negligent misrepresentation on the part of Wachovia. (*Id.*) Specifically, the defendants allege that Wachovia intentionally or negligently falsely represented that the tax strategy was a "no lose" proposition, a "clean deal," and that it complied with IRS rules and regulations. (*Id.*) The defendants further allege that they justifiably relied on Wachovia's false representations in deciding to engage Wachovia's financial services. (*Id.*) The underlying facts of these claims bear no significant relationship to the promissory note.

Count Eight of the defendants' state court complaint alleges promissory estoppel. (*Id.*) Specifically, the defendants allege that they relied on Wachovia's representations to their detriment and have suffered damages. (Pl.'s Pet. Arbitration Ex. A.) Furthermore, the defendants allege that their damages consist of the fee they paid Wachovia pursuant to the en-

gagement letter. (*Id.*) The underlying facts of this claim bear no significant relationship to the promissory note.

Count Nine of the defendants' state court complaint alleges a violation of the SCUTPA. (*Id.*) Specifically, the defendants allege that Wachovia's marketing and servicing of the tax strategy is an unfair and deceptive trade practice capable of repetition. (*Id.*) The underlying facts of this claim bear no significant relationship to the promissory note.

Count Ten of the defendants' state court complaint alleges a breach of fiduciary duty. (*Id.*) Specifically, the defendants allege that by engaging Wachovia's financial services, Wachovia was placed in a fiduciary relationship with them. (*Id.*) Further, the defendants allege that by failing to give a full and fair disclosure Wachovia breached its duties. (Pl.'s Pet. Arbitration Ex. A.) The underlying facts of this claim bear no significant relationship to the promissory note.

Count Eleven of the defendants' state court complaint alleges that Wachovia aided and abetted a breach of fiduciary duty. (*Id.*) Specifically, the defendants allege that Wachovia's conduct, actions, and statements contributed to a breach of fiduciary duty. (*Id.*) The underlying facts of this claim bear no significant relationship to the promissory note.

Finally, the defendants seek a declaratory judgment. (*Id.*) Specifically, the defendants seek to have the exculpatory language contained in Wachovia's engagement letter declared unenforceable.[2] (*Id.*) The underlying facts of this claim bear no significant relationship to the promissory note. Therefore, Wachovia's petition for an order of arbitration and motion to compel arbitration are denied as to the arbitration clause contained in the promissory note.

[2] Wachovia's engagement letter states that any damages arising out of Wachovia's relationship with the defendants under the engagement letter will be limited to Wachovia's one hundred thousand dollar ($100,000.00) fee. (Def.'s Mem. Opp'n Arbitration Ex. 1.)

B. Warrant

In addition, Wachovia seeks to compel arbitration pursuant to the arbitration clause contained in the warrant purchased by the defendants from Sandpiper. Wachovia is not a party to the warrant. The defendants assert that because Wachovia is not a party to the warrant, it cannot enforce the arbitration clause. The court agrees.

In certain circumstances, "a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *Int' l. Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000). The court considers the following "five theories arising out of common law principles of contract and agency law [to] provide a basis for binding nonsignatories to arbitration agreements; (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel." *Id.* (internal quotations omitted). Wachovia broadly states that it is entitled to enforce the warrant's arbitration provision as a nonparty, but fails to establish whether it was incorporated into the warrant by reference, assumed Sandpiper's obligations, was in an agency relationship with Sandpiper, was the alter ego of Sandpiper, or that the defendants are estopped from arguing that Wachovia is not entitled to enforce the warrant's arbitration provision. After review, the court finds that Wachovia is not entitled to enforce the arbitration provision contained in the warrant. Therefore, Wachovia's petition for an order of arbitration and motion to compel arbitration are denied as to the arbitration clause contained in the warrant.

It is therefore

ORDERED that Wachovia's petition for an order of arbitration and motion to compel arbitration are denied.

IT IS SO ORDERED.

/s/ HENRY M. HERLONG, JR.
UNITED STATES DISTRICT JUDGE

GREENVILLE, SOUTH CAROLINA
AUGUST 1 , 2003

United States Court of Appeals
For The Fourth Circuit

WACHOVIA BANK NATIONAL ASSOCIATION
Plaintiff-Appellant

v.

DANIEL G. SCHMIDT, III; PRAIG LLC;
DGS INVESTMENTS, INCORPORATED,
Defendants-Appellees

OFFICE OF THE COMPTROLLER OF THE CURRENCY
Amicus Supporting Appellant

No. 03-2061
CA-03-2005-6-20

Filed: January 28, 2005

On Petition for Rehearing
and Rehearing En Banc

Before the Court is the appellant's petition for rehearing with request for rehearing en banc. On the petition for rehearing before the panel, Judge King voted in favor of such rehearing, and Judges Luttig and Beezer voted against rehearing. Panel rehearing is thus denied.

An active judge having called for a poll of the Court on the appellant's request for rehearing en banc, such poll was conducted and failed to garner majority support of the active judges. Judges Wilkinson, Niemeyer, Michael, Motz, King, and Duncan voted in favor of rehearing en banc, whereas Judges Luttig, Williams, and Shedd voted against rehearing en banc. Chief Judge Wilkins, along with Judges Widener, Traxler, and Gregory, deemed themselves disqualified and did not participate.

Pursuant to the foregoing, the appellant's petition for rehearing and request for rehearing en banc is hereby denied.

Judge King wrote an opinion dissenting from the denial of rehearing en banc, which is filed herewith.

For the Court,

/s/ PATRICIA S. CONNOR
CLERK

KING, Circuit Judge, dissenting from denial of rehearing en banc:

I write again in this appeal to emphasize my view that it presents a question of "exceptional importance," warranting en banc consideration by this Court. *See* Fed. R. App. P. 35(a)(2). I subscribe to this position for several compelling reasons: (1) the decision of the panel majority is incorrect; (2) the panel decision has created a circuit split on the question of whether a national banking association is entitled to invoke diversity jurisdiction in the federal courts on the same terms as corporations and state banks; and (3) our panel decision results in immediate injury to those national banking associations that litigate in the five states and nine districts of this Circuit by circumscribing their access to the federal court system. As explained herein, and also premised on my earlier dissenting opinion, *see Wachovia Bank, N.A. v. Schmidt*, 388 F.3d 414, 432-40 (4th Cir. 2004) (King, J., dissenting), I dissent from the denial of en banc consideration of this appeal.

As an initial point, although a majority of the participating active judges of this Court support en banc rehearing in this case, Wachovia has nonetheless, because of the anomaly of Rule 35(a), lost on the poll of the Court. *See* Fed. R. App. P. 35(a) ("A majority of the circuit judges who are in regular active service may order that an appeal . . . be heard or reheard by the court of appeals en banc."). While six of our thirteen active judges have voted in favor of en banc rehearing, only three have voted to deny en banc consideration (the remaining four active judges deemed themselves disqualified). The six judges voting in favor of en banc rehearing, however, fail to constitute a "majority of the circuit judges who are in regular active service" under Rule 35(a). *See* Local Rule 35(b) (defining "majority," for purposes of en banc poll, as majority of active judges "without regard to whether a judge is disqualified"). Although the public will likely per-

ceive this outcome to be more than passing strange, we are bound by the applicable procedural rules.

With all respect to our distinguished colleague Judge Luttig, who authored the opinion of the panel majority, and to our distinguished visiting colleague from the Great Northwest, Judge Beezer, who joined in that opinion, I see their conclusion as wrong. Put simply, diversity jurisdiction is present in this case. Section 1332(a)(1) of Title 28 provides the district courts with original jurisdiction over suits between citizens of different states involving more than $75,000. As the panel majority recognized, Wachovia's citizenship, and thus the presence of diversity jurisdiction, turns on the meaning of "located" in § 1348 of Title 28 (providing that national banks are "citizens of the States in which they are respectively located"). In this case, the defendants are citizens of South Carolina; plaintiff Wachovia is, under the proper assessment of § 1348, located in North Carolina (the principal place of its business); and diversity jurisdiction is thus present. *See Wachovia Bank*, 388 F.3d at 433 (King, J., dissenting).

As I explained in my earlier dissenting opinion, the panel majority's conclusion that the term "located" also includes Wachovia's branch offices in South Carolina is incorrect. The term "located," as used in § 1348, is ambiguous. *See* 388 F.3d at 434 (King, J., dissenting). Because a national bank is an artificial and abstract entity created by statute, it can be "located" in a broad range of places, and our resort to dictionaries to ascertain the statutory meaning of the term is unavailing. Congressional intent is thus implicated on the issue of what "located," as used in § 1348, means. *See id.* at 434-35 (King, J., dissenting). Importantly, Congress has never sought to relegate disputes involving national banks to the state courts. Congress has, to the contrary, consistently intended to provide national banks with the same access to the federal courts as that accorded corporations and state banks.

See Id. (King, J., dissenting). And the Supreme Court has recognized and enforced congressional intent on this point. *See Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 566 & n.22 (1963); *Herrmann v. Edwards*, 238 U.S. 107, 117-18 (1915); *Petri v. Commercial Nat'l Bank of Chi.*, 142 U.S. 644, 649-51 (1892); *Leather Mfrs.' Bank v. Cooper*, 120 U.S. 778, 780-81 (1887).

Indeed, the three courts of appeals that have faced the question posed in this appeal have agreed with the position espoused in my earlier dissenting opinion. *See Horton v. Bank One, N.A.*, 387 F.3d 426 (5th Cir. 2004) (holding that "a national bank is not 'located' in, and thus not a citizen of, every state in which it has a branch"); *Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001) (holding that "located' should be construed to maintain jurisdictional equality between national banks and state banks and other corporations"); *Am. Surety Co. v. Bank of Cal.*, 133 F.2d 160 (9th Cir. 1943) (explaining that if Congress had intended for national banks to be deemed citizens of states where they operate branch offices, "it would be a noteworthy departure from the general rule, and more likely than not Congress would have plainly state[d] such intent"). Each of those courts construed the term "located" to provide national banks with the same access to the federal courts as that accorded corporations and state banks. The panel majority has thus — in my view, unnecessarily — created a circuit split on this important question.

In sum, the decision of the panel majority has misconstrued the meaning of the term "located" in § 1348; it has contravened congressional intent on this question; and it has created a circuit split where none previously existed. And, paradoxically, our decision may well contravene the view of the majority of the participating active judges of this Court. Our failure to accord en banc consideration to the exceptional question presented in this appeal ignores the disruptive con-

sequences our decision is likely to visit upon national banks, whose access to the federal courts in this Circuit has now been severely circumscribed. This is an unfortunate result, the panel decision plainly warrants en banc rehearing, and I respectfully dissent from its denial.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

6500 CHERRY WOOD LANE
GREENBELT, MARYLAND 20770
301-344-0632

MEMORANDUM

TO: Counsel of Record

FROM: Judge Peter J. Messitte

RE: *Coots, et al. v. Wachovia, et al.*
Civil Case No. PJM 03-705

DATE: February 11, 2005

*****

The Fourth Circuit has recently remanded this case "for a determination of whether there is diversity jurisdiction in this case." *Coots, et al. v. Wachovia Securities, Inc., et al.*, 2004 U.S. App. LEXIS 25554 (4th Cir., December 4, 2004).

This case was removed from the Circuit Court for Montgomery County, Maryland on March 14, 2003. Plaintiffs amended their Complaint to add Wachovia Bank, N.A. as a Defendant, invoking the diversity jurisdiction of this Court under 28 U.S.C. § 1332. The Court denied Defendants' Motion to Enforce Arbitration Agreement on December 15, 2003, which Defendants appealed to the Fourth Circuit. On July 21, 2004, the Court ordered this case to be Administratively Closed pending the outcome of the appeal, but retained jurisdiction "in the event the parties wish to continue litigation following resolution of their appeal and/or arbitration."

It appears that this Court does not have jurisdiction over this action. Coots is a citizen of Maryland. Wachovia Bank, N.A., is a citizen of every state in which it operates branch offices. 28 U.S.C. § 1348; *Wachovia Bank, N.A. v. Schmidt, et al.*, 388 F.3d 414 (4th Cir. 2004). The Court has received

the Parties' correspondence of February 10, 2005, which notes that "[i]n the interests of judicial economy, please be advised that while Wachovia Bank's principal place of business is in North Carolina, it does have branch offices in Maryland."

Since 28 U.S.C. § 1332(a) requires "complete diversity between the real and substantial parties in interest," and such requirement is lacking in this case, the Court hereby DISMISSES this action and REMANDS the case back to the Circuit Court of Montgomery County, Maryland.

The Clerk of the Court is directed to CLOSE this case.

Despite the informal nature of this ruling, it shall constitute an Order of Court and the Clerk is directed to docket it accordingly.

/s/ PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

cc: Court File

NO. 03-2061

IN THE UNITED STATES
COURT OF APPEALS
FOURTH CIRCUIT

WACHOVIA BANK, N.A.
Plaintiff/Appellant,

vs.

DANIEL G. SCHMIDT III, ET AL.,
Defendants/Appellees

BRIEF AMICUS CURIAE OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY IN SUPPORT OF PLAINTIFF WACHOVIA BANK, N.A.'S PETITION FOR REHEARING AND REQUEST FOR REHEARING EN BANC

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The Office of the Comptroller of the Currency ("OCC"), the bureau within the Department of Treasury charged with the administration of the National Bank Act, 12 U.S.C. §§ 1, *et seq.*, and supervision of national banks, including Plaintiff Wachovia Bank, N.A., Charlotte, North Carolina (the "Bank"), files this brief amicus curiae in support of the Bank's Petition for Rehearing and Request for Rehearing en Banc. The Bank's Petition was filed November 15, 2004.

I. Interest of Amicus Curiae

As part of its supervisory responsibilities, the OCC determines, inter alia, whether to charter a national bank, to appoint a conservator or a receiver for a national bank, to take administrative enforcement action for violations of law and "unsafe and unsound" banking practices, and whether to approve various changes to a national bank's corporate structure, including applications to branch, merge, or relocate. *See, e.g.*, 12 U.S.C. §§ 21, 27, 30, 36, 191, 203, and 1818. The OCC's "task of preserving public confidence in the financial institutions of this nation is vital to our economic future." *The First Nat'l Bank of Gordon v. Department of the Treasury*, 911 F.2d 57, 62 (8th Cir. 1990).

The question of a national bank's citizenship for purposes of diversity jurisdiction raises an issue of exceptional importance that affects the ability of national banks and those who litigate against them to vindicate their rights in federal court. As the federal agency responsible for supervising national banks and ensuring the safety and soundness of the national banking system, the OCC has an institutional interest in any

judicial decision that curtails the rights of national banks and adversely affects their operations.

By denying national banks access to a federal forum on the same terms as other corporate entities, the majority opinion not only creates a conflict among the U.S. circuit courts of appeals, but it places national banks at a competitive disadvantage as to state chartered banks and other lenders with which national banks compete. The Court's decision would require dismissal of cases involving national banks that are pending in federal district courts throughout the Fourth Circuit based on a new rule for determining national bank citizenship that is at odds with the acknowledged purpose of over 100 years of congressional action affecting national bank access to federal court. At a minimum, this Court's decision would impose delay and costs on those litigants whose cases must be dismissed and brought, if possible, in state court. The restriction of the ability of national banks to come into federal courts to vindicate their rights and the consequent disruptions to their operations are of great concern to the OCC.

The question of the Bank's citizenship under 28 U.S.C. § 1348 arose for the first time during oral argument. Consequently, the OCC had no notice that this issue was before the Court and had no opportunity to appear as amicus curiae and file a brief in accordance with Fed. R. App. P. 29 to present its views on this issue. Given the importance of this question, the OCC files this brief amicus curiae in support of the Bank's Petition for Rehearing and Request for Rehearing en Banc.

II. The Grounds for Granting Wachovia's Petition for Rehearing and Request for Rehearing En Banc Are Met

Under Fed. R. App. P. 35(a)(2) and Local Rule 40(b) of this Court, the panel's interpretation of 28 U.S.C. § 1348 to

mandate that a national bank is a citizen of every state in which it has a branch office, slip. op. at 2, involves a question of "exceptional importance."

A proceeding presents a question of exceptional importance if it involves an issue on which the panel decision "conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. R. App. P. 35(b)(1)(B). Such is the case here. Until now, virtually all circuit courts of appeals that have addressed the issue of a national bank's citizenship under section 1348[1] have concluded that the term "located" refers, at most to two states: the state in which the national bank has its main office[2] and the state of the bank's principal place of business.

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[1] As noted by Judge King in his dissent, slip. op. at 68 n.5, the Second Circuit has recently indicated that, under section 1348, a national bank should be deemed "a citizen of every state in which it has offices." *World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 161 (2d Cir. 2003) (*dicta*). The decision upon which that panel relied, *United Republic Ins. Co. v. Chase Manhattan Bank*, 315 F.3d 168, 169 (2d Cir. 2003) (*per curiam*), did not *hold* that "located" includes a national bank's branch offices; it simply remanded for an assessment of citizenship.

[2] In *Firstar*, the Seventh Circuit explained that, in order to maintain jurisdictional parity between national banks and state banks or other corporations, national banks would need to be citizens of potentially two different states. This was because 28 U.S.C. § 1332(c)(1) provided that a state corporation, including a state bank, is a citizen of its state of incorporation and the state where it has its principal place of business. 253 F.3d at 993-94. Concluding that the state listed in a national bank's organization certificate is analogous to the state of incorporation for a state chartered corporation, the *Firstar* court held that a national bank was located for purposes of section 1348 in the state listed in its organization certificate and the state where it had its principal place of business. *Id.* at 994.

These courts have rejected the interpretation that "located," as used in section 1348 properly includes any state in which a national bank operates a branch office. *Horton v. Bank One*, 387 F.3d 426 (5th Cir. 2004); *Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001); *American Surety Co. v. Bank of California*, 133 F.2d 160, 162 (9th Cir. 1943).

The Advisory Committee's Notes indicate that it is appropriate to grant rehearing *en banc* when a panel decision *creates* a conflict among the circuits. *See* Fed. R. App. P. 35 advisory committee's notes, 1998 Amendments. "Intercircuit conflicts create problems. When the circuits construe the same federal law differently, parties' rights and duties depend upon where a case is litigated." *Id.* By granting the Bank's petition for rehearing, this Court will be able to follow Justice Frankfurter's advice that the "most constructive way of resolving conflicts is to avoid them." *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247, 270 (1953) (Frankfurter, J., concurring).

The panel's decision interpreting 28 U.S.C. § 1348 has wide-ranging implications for questions of practice and procedure going beyond the effect on the parties to this particular case, a further basis for granting rehearing. *See, e.g.*, *California Medical Ass'n v. Federal Election Comm'n*, 641 F.2d 619, 632 (9th Cir.), *aff'd*, 453 U.S. 182 (1980) (*en banc* review appropriate because decision affected all entities defined as political committees under the Federal Election Campaign Act); *F&M Schaefer Brewing Company v. United States*, 236 F.2d 889 (2d Cir. 1956), *rev'd on other grounds*, 356 U.S. 227 (1958) (*en banc* review granted where the court's construction of the federal tax code to require dismissal of government's appeal could affect other cases). As explained above, the panel decision will have a profound effect upon litigation involving national banks in the Fourth Circuit. It will cause all litigants, regardless of the stage of the litigation, to lose the protection of a federal forum for

state law claims involving a national bank if that bank has a single branch in a state where any opposing party is a citizen.

Ultimately, rehearing is appropriate because the panel's determination that the term "located" unambiguously encompasses interstate branch locations departs from over 100 years of congressional action regarding federal court jurisdiction for national banks and consistent Supreme Court interpretation.[3] Review is "indicated whenever it seems likely that a majority of all the active judges would reach a different result than the [original] panel . . . .", *Western Pacific Railroad*, 345 U.S. at 270 (Frankfurter, J., concurring), or that "special circumstances and important implications" may justify en banc consideration. 345 U.S. at 261. As explained below, because legislation affecting national bank access to federal courts has the consistent congressional purpose of putting national banks on the same footing as state banks and corporations for purposes of diversity jurisdiction, the panel decision should be reviewed so that this Court can give effect to the intent of Congress.

III. Rehearing is Required to Properly Construe Section 1348

A. The Term "Located" is Ambiguous

The majority holding that the term "located" includes Wachovia's branch offices in South Carolina is incorrect, and proceeds from the majority's erroneous conclusion that the term "located," as used in section 1348, is "unambiguous." Slip op. at 5. No other court of appeals has found the meaning of "located" in section 1348 to be so clear as to preclude any ambiguity regarding its interpretation for purposes of that statute. Indeed, three other courts of appeals have explicitly

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[3] *Financial Software Systems, Inc. v. First Union Nat'l Bank*, 84 F. Supp. 2d 594, 599 (E.D. Pa. 1999).

or implicitly rejected that conclusion. The majority's conclusion is possible only by discounting the history of legislation in this area and judicial precedent, which are indispensable to a correct understanding of section 1348, in favor of formulaic application of general principles of statutory construction. It is only by reference to this legislative history, as demonstrated by a succession of Supreme Court decisions, that the congressional intent[4] behind the jurisdictional statutes governing national bank access to federal courts, including section 1348, can be determined.

As the Supreme Court recognized in *Citizens & Southern Nat'l Bank v. Bougas*, 434 U.S. 35, 44 (1977), "there is no enduring rigidity about the word 'located,'" and the Court found the word to be ambiguous. *See Horton*, 387 F.3d 426, at *6; *Financial Software*, 84 F.Supp.2d at 598 ("the term 'located' is not a term of art in the law"). Moreover, as the dissent recognizes, slip op. at 60, a statutory term must be deemed ambiguous, if, when examined in context, it is susceptible to more than one reasonable interpretation. *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 367 F.3d 245, 250 (4th Cir. 2004), quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). *See also Smiley v. Citibank*, 517 U.S. 735, 739 (1996) (In light of three differing court interpretations of the term "interest" as used in the National Bank Act, "it would be difficult indeed

[4] The majority acknowledges that a policy granting national banks access to federal courts on the same terms as state banks and other state corporations "may be preferable," and suggests that its decision may stimulate Congress to legislatively reverse the panel's decision by amending section 1348, slip op. at 27. The majority's observation, however, fails to recognize that the policy choice made by Congress, and annulled by the majority's construction of the statute, was to ensure parity between national banks and state banks with respect to their access to federal courts.

to contend that the [term] is unambiguous with regard to the point at issue here."). If a term is ambiguous, the reviewing court must "seek to determine the construction intended by Congress." *See Newport News Shipbldg & Dry Dock Co. v. Brown*, 376 F.3d 245, 248 (4th Cir. 2004).[5]

B. Congress Intended National Banks to Have Access to the Federal Courts on the Same Terms as State Banks and Corporations

It is no accident that the courts of appeals, until the majority opinion, have interpreted section 1348 as mandating that a national bank is a citizen of at most two places: the state in which its main office is located and the state in which it has its principal place of business. For over 100 years, the Supreme Court has explained that Congress adopted the statutes governing national bank access to federal courts to give federal courts jurisdiction over claims involving national

[5] According to the majority's analysis, the unambiguous terms "established" and "located" in section 1348 have different meanings and "located" necessarily includes locations where national banks operate branches. Slip op. at 12-15. This conclusion is not mandated by the statutory language and cannot be squared with the history of the provisions in which these terms appear. Indeed, other courts have found that the terms are in fact synonymous. One federal court construing these terms concluded that a national bank is both "established" and "located" only at the place specified in its organization certificate. *Mfr.'s Nat'l Bank v. Baack*, 16 F. Cas. 671, 673 (C.C.S.D.N.Y. 1871). *See also Financial Software*, 84 F. Supp. 2d at 604 (the words "established" and "located" date back to the Act of 1882, at which time they were "functionally synonymous because national banks had no branches."). In fact, the Supreme Court used the terms interchangeably in 1947, observing that a national bank is a "citizen" of the state in which it is "established or located, and in that district alone can it be sued." *Cope v. Anderson*, 331 U.S. 461, 467 (1947).

banks on like terms as state banks and corporations. *Financial Software*, 84 F. Supp. 2d at 599.

This "parity" principal is extremely important to a proper understanding of the term "located" in section 1348. If, as the majority concludes, national banks were to be deemed citizens of all states in which they operate branches, it would place them in a less favorable position vis-a-vis state banks and corporations, whose access to federal court diversity jurisdiction is governed by 28 U.S.C. § 1332(c)(1). In short, "a national bank would enjoy access to diversity jurisdiction only when sued by or suing a citizen of a state in which the bank maintains no branch at all. Corporations and state banks do not have such a limited access to federal court." *Horton*, 387 F.3d 426, at *17.

When Congress authorized creation of the first national banks in 1863, it provided that suits by and against them could be initiated in the federal courts, which was interpreted as requiring all suits against national banks to be bought in federal court. *See* Act of Feb. 25, 1863, ch. 58, 12 Stat. 665, 681; *Petri v. Commercial Nat'l Bank of Chicago*, 142 U.S. 644, 648 (1892). In 1864, Congress provided that suits against national banks could be brought in "any state, county or municipal court . . . having jurisdiction in similar cases." National Bank Act of 1864, § 57, 13 Stat. 99, 116-17 (1864). Congress acted in 1882 to put national banks on the same footing with respect to access to federal courts as state banks in like situations. *See Leather Mfrs.' Nat'l Bank v. Cooper*, 120 U.S. 778, 780-81 (1887).

The statute Congress enacted in 1882 provided that jurisdiction over lawsuits involving national banks "shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States . . . ." This amendment "was evidently intended to put national banks on the *same footing as the banks of the state where they were located* for all the purposes of the jurisdiction of the courts of the United States." 120 U.S. at 780 (emphasis added). *See also Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 566 (1963) (The 1882 Act "sought to limit, with exceptions, access of national banks to and their suability in, the federal courts to the same extent to which non-national banks are so limited."). *See also Petri*, 142 U.S. at 650-51 ("No reason is perceived why it should be held that congress intended that national banks should not resort to federal tribunals as other corporations and individual citizens might.").

This principal of parity is embodied in all legislation governing national banks' access to federal courts and is essential to a correct interpretation of section 1348.[6] As the Seventh Circuit has explained:

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[6] If, in 1911 or 1948, Congress had intended to alter the result that national banks have the same access to federal courts that state banks and corporations have, Congress would have used specific language to achieve that result. But it is difficult to imagine that Congress had any fixed idea about the citizenship of a national bank except that a national bank would be treated as a citizen of the one place where it had its principal place of business. In 1911, Congress had not authorized general branching by national banks although some national banks had branches that they retained after they converted from state banks. Moreover, while all national banks were granted limited authority to branch within the same state by the McFadden Act in 1927, that branching authority did not permit a national bank to establish a branch in a different state. Thus, the Congress that enacted the jurisdictional statute in 1911 could not have contemplated that the term located would encompass national bank branches. Certainly, if Congress had intended to make a national bank's citizenship, and its access to federal court, dependent upon the location of the bank's branches, Congress would have made some affirmative change to the jurisdictional statutes in 1948 to reflect that change. This would be particularly true given that the Ninth Circuit had specifically held

> [P]rinciples of statutory construction weigh heavily in favor of construing "located" in 28 U.S.C. § 1348 to refer to a more limited number of states than wherever the bank has a branch. Statutory words or phrases ambiguous in their common or contextual definitions can achieve settled meaning through judicial interpretation. If a phrase or section of a law is clarified through judicial construction, and the law is amended but retains that same phrase or section, then Congress presumably intended for the language in the new law to have the same meaning as the old.

Firstar, 253 F.3d at 988, citing *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998), and *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). Moreover, "the courts presume that Congress will use clear language if it intends to alter an established understanding about what a law means; if Congress fails to do so, courts presume that the new statute has the same effect as the older version." *Id.*, citing *Cottage Savings Ass'n v. Commissioner*, 499 U.S. 554, 562 (1991). *See also* slip. op. at 64-65 (King, J., dissenting).

C. The Court Should Construe Section 1348 to Implement Congressional Intent Regarding Federal Court Jurisdiction Over Suits Involving National Banks

The detailed historical and legislative analysis conducted by the Fifth and Seventh Circuits and to a lesser extent by the Ninth Circuit informs their uniform construction of section 1348. That analysis led to the same conclusion reached by the dissent in this case: Congress has "consistently intended

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in *American Surety* in 1943 that a national bank is not a citizen, for purposes of diversity jurisdiction, of the states where it operates interstate branches, based on language in the 1911 statute that is virtually identical to section 1348.

to provide national banks with the same access to the federal courts as that accorded state banks and corporations . . . [and] has never sought . . . to relegate disputes involving national banks to the state courts." Slip. op. at 57 (King, J., dissenting). *See also American Surety Co. v. Bank of California*, 44 F. Supp. 81, 83 (D. Or. 1941), *aff'd*, 133 F.2d 160, 162 (9th Cir. 1943). Until the majority decision here, no federal appellate court had quarreled with this conclusion.

In *Firstar*, the Seventh Circuit focused squarely on the issue this way: "The 1882 Act established that national banks could take advantage of federal jurisdiction to the same extent as state banks, as expressed in *Cooper*. This same basic interpretation carried over to the 1887 Act, which *Petri* interpreted as placing national banks in the same position regarding federal jurisdiction as corporations." 253 F.3d at 988. Further, "[w]hen Congress enacted 28 U.S.C. § 1348 in 1948, this principle of equal jurisdictional access had been established and followed by the courts for over sixty years." *Id.* It is plain, therefore, that Congress enacted section 1348 "against a backdrop of equal access to the federal courts for national banks, state banks, and corporations." *Horton*, 387 F.3d 426, at *11. As the Fifth Circuit concluded,

> We are persuaded that this goal of jurisdictional parity is best served by interpreting "located" as referring to a national bank's principal place of business as well as the state specified in the bank's articles of association. Since a state bank, under 28 U.S.C. § 1332(c)(1), may be a citizen of no more than two states - the state where its principal place of business is located and its state of incorporation - maintaining jurisdictional parity between a national and state bank requires that the national bank have no more than two possible states of citizenship.

Horton, 387 F.3d 426, at *13, quoting *Firstar*, 253 F.3d at 993.

By ignoring the intent of Congress, the majority opinion constructs a jurisdictional regime that denies national banks, and those that litigate against them, access to federal courts and the protections that flow from this Constitutionally-authorized forum for litigants from different states. Congress has never acted to deny national banks the same protections afforded to state banks and other corporate entities by the diversity jurisdiction of the federal courts. The decision by a divided panel of this Court that denies national banks these protections is based on a improper construction of section 1348 and requires correction.

IV. Conclusion

For all the foregoing reasons, the OCC urges this Court to grant the Bank's petition for rehearing in this matter.

Respectfully submitted,

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(3)

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In The Supreme Court of the United States

WACHOVIA BANK, NATIONAL ASSOCIATION,

Petitioner,

v.

DANIEL G. SCHMIDT, III, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Fourth Circuit correctly determined a national banking association is, within the meaning of 28 U.S.C. §1348, "located" in a state in which the national banking association operates branch offices, and therefore a citizen of that state for purposes of diversity jurisdiction.

PARTIES TO THE PROCEEDING

First Union National Bank is a real party in interest in the prior proceedings in the district court and the court of appeals. Wachovia Bank, National Association merged with First Union National Bank and is the successor by merger.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, the Respondents Daniel G. Schmidt, III, PRIAG, LLC, and DGS Investments, Inc., are not publicly held corporations or entities, and there is no parent or publicly held company owning ten percent or more of the corporations' stock. Respondent Schmidt owns ninety-eight percent of PRIAG, while DGS Investments owns the remaining two percent.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Daniel G. Schmidt, III, PRIAG, LLC, and DGS Investments, Inc., (collectively, "Respondents") respectfully request this Court deny the petition for a writ of *certiorari* filed by Wachovia Bank, National Association, f/k/a First Union National Bank ("Petitioner"), to review the decision of the Fourth Circuit court of appeals in *Wachovia Bank, National Association v. Schmidt, et al.* reported at 388 F.3d 414. Pet. App., p. 1a.

INTRODUCTION

Petitioner is challenging a majority decision of a three-judge panel of the Fourth Circuit court of appeals ("Fourth Circuit" or "court of appeals") which carefully and thoroughly determined a national banking association is "located," for purposes of 28 U.S.C. § 1348, in every state where it has a branch bank. Petitioner argues the court of appeals' application of statutory interpretation somehow runs counter to this Court's case law in that 28 U.S.C. § 1348, and its statutory predecessors, were intended to maintain jurisdictional parity between national banks and other corporations.

Not only does the Fourth Circuit's decision correctly apply the doctrines of statutory construction, it fully comports with this Court's prior decisions, including *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S.

Ct. 843, 136 L. Ed. 2d 808 (1997) and *Koons Buick Pontiac GMC, Inc. v. Nigh*, __ U.S. __, 125 S. Ct. 460, 160 L. Ed. 2d 389 (2004). Petitioner would have this Court believe the Fourth Circuit ignored evidence of Congress' true intent when construing §1348, however, this simply is not supported by the record. Moreover, the Fourth Circuit's decision correctly applied the *in pari materia* canon to 28 U.S.C. § 1348 and determined the presence of branch banking offices in a state is determinative of where a national bank is "located."

The Fourth Circuit acted well within the scope of this Court's prior decisions in holding the Petitioner, through the existence of branch offices, was located in South Carolina, the state of citizenship of the Respondents. As such, there is a lack of complete diversity as required by 28 U.S.C. § 1332.

The Fourth Circuit disagrees with the decisions reached by the Fifth and Seventh Circuit Courts of Appeals,[1] concluding those decisions are unsupported by statutory and historical analysis and are not persuasive since they "amount to little more than judicial assertion of a policy preference in favor of federal forums for national banking associations." Pet. App., p. 32a. However, this is not the first instance where the federal courts of appeals differ in their interpretation of statutes involving diversity jurisdiction.

As shown below, Congress may resolve the question presented in the near future, a factor which

[1] *See Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001); and *Horton v. Bank One*, 387 F.3d 426 (5th Cir. 2004).

weighs heavily against Petitioner's request for review. If the statute, as written, does not effectuate Congress' preference as to the forum for disputes such as the present case, Congress may certainly amend the statute. The Fourth Circuit, following this Court's case law, refused to usurp the role of the legislature by legislating such an amendment through judicial construction. *See Carden v. Arkoma Assoc.*, 494 U.S. 185, 197, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990).

STATEMENT OF THE CASE

Prior to 1998, Petitioner had been Respondent Schmidt's personal and business banker, and following the sale of his physical therapy companies in May, 1998, Petitioner managed substantial sums received from the sale. Based upon this pre-existing relationship, Petitioner allegedly targeted Respondent Schmidt when it learned he faced significant exposure to capital gains taxes under federal and state law. Following the sale of his company, Respondent Schmidt was approached by Petitioner's employees who told him the bank had an investment strategy that strictly complied with the United States Internal Revenue Service's rules and regulations. Pet. App. p. 48a.

In 1998, Petitioner, along with KPMG, LLP ("KPMG") and others, acted as tax and financial advisors to the Respondents. Pet. App., p. 47a. In the provision of advisory services, those trusted advisors allegedly engaged in fraud and deceit in procuring

Respondents' payment of large and excessive fees in exchange for the tax and financial services described more fully below. Pet. App., p. 48a.

Petitioner sold a number of investment strategies known as Foreign Leveraged Investment Programs ("FLIP") to wealthy individuals, including the Respondents, which were devised, in part, to provide a so-called "basis shift" to shelter capital gains. Pet. App., p. 48a. Petitioner strongly recommended the Respondents take part in the tax strategy but failed to warn them about the possibility of penalties and other risks which were allegedly known to Petitioner, KPMG and QA Investments. Pet. App., p. 48a.

Petitioner allegedly marketed the tax strategy as "legal," "bullet proof," a "clean deal," "never audited," and that it strictly complied with the United States Internal Revenue Service's ("IRS") rules and regulations. Pet. App., p. 48a. Respondents also received a tax opinion letter which falsely stated the tax strategy was legal. Pet. App., p. 48a. Respondent alleges the Petitioner and KPMG never disclosed the true nature and risks of the strategy to Respondents.

In reality, the tax strategy promoted and sold by Petitioner contained serious undisclosed tax risks which were known or should have been obvious to Petitioner (and other defendants) but not disclosed. Pet. App., p. 48a. Those concealed tax risks included the possibility the IRS would not only deny the capital loss, resulting in an increased tax liability and

accompanying interest, but impose accuracy-related penalties. Pet. App., p. 48a.

The Respondents commenced a civil action in the South Carolina Court of Common Pleas, Thirteenth Judicial Circuit, County of Greenville, on April 10, 2003, and thereafter amended the complaint on May 20, 2004 (the "state court"). Pet. App., p. 47a. The state court case is styled as *DANIEL G. SCHMIDT, III, PRIAG, LLC, and DGS INVESTMENTS, INC., v. KPMG, LLP, PILLSBURY WINTRHOP, LLP, f.k.a. Pillsbury Madison & Sutro, LLP, WACHOVIA BANK, N.A., f.k.a. First Union National Bank, QA INVESTMENTS, LLC, QUELLOS GROUP, LLC, as successor in interest to Quadra Capital Management, LP, Quellos Capital Management, LP, as successor in interest to Quadra Capital Management, LP,* Civil Action No. 2003-CP-23-2470.

The state court causes of action alleged against Petitioner are: civil conspiracy, fraud, constructive fraud, negligent misrepresentation, promissory estoppel, South Carolina Unfair and Deceptive Trade Practices Act, breach of fiduciary duty, aiding and abetting, and declaratory relief (premised on allegations that Petitioner's fee agreement is illegal, unethical, void, contrary to public policy and unenforceable). Pet. App., p. 48a - 49a. Respondents have now resolved their claims with all of the defendants except the Petitioner.

On the basis of diversity jurisdiction and provisions of the Federal Arbitration Act, Petitioner commenced a federal court proceeding by filing a petition to compel arbitration in the United States

District Court for the District of South Carolina ("district court"). KPMG and the remaining defendants in the state court case filed their motions to compel arbitration in the state court, wherein the state court judge denied those motions to compel arbitration.

The district court denied Petitioner's federal court petition for an order of arbitration and motion to compel arbitration by Order dated August 1, 2003. Pet. App., p. 47a. Petitioner appealed the district court's decision to the Fourth Circuit. However, the ultimate decision issued by the Fourth Circuit does not reach the arbitration issue since the court of appeals found the district court lacked federal jurisdiction. The Fourth Circuit held Petitioner and Respondents are citizens of South Carolina pursuant to 28 U.S.C. § 1348, and that diversity jurisdiction was lacking. Pet. App., p. 32a.

REASONS FOR DENYING THE PETITION

Petitioner would have this Court believe the Fourth Circuit's decision involves a jurisdictional issue of "great legal and practical significance" (*see* Pet, p. 5), and upsets settled expectations under federal law. As shown more fully below, there are numerous decisions involving jurisdiction in which the courts of appeals are split. This Court need not be compelled to address every such division simply because the question is one of federal jurisdiction.

Petitioner would further have this Court believe the notion of "jurisdictional parity" between national banks and other corporations dictates the judicial construction of 28 U.S.C. § 1348. However, the history of § 1348 reveals only that its purpose was to guarantee national banks are subject to the rules of diversity jurisdiction, as opposed to the automatic federal question jurisdiction arising solely from a national bank's federal charter.

Finally, the Petitioner asserts the Fourth Circuit's mode of analysis cannot be reconciled with this Court's opinion in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997) and *Koons Buick Pontiac GMC, Inc. v. Nigh*, __ U.S. __, 125 S. Ct. 460, 160 L. Ed. 2d 389 (2004). Respondents submit the Fourth Circuit's decision provides a detailed determination of the plainness of § 1348 by analyzing (1) the ordinary meaning of "located," (2) its use in juxtaposition with the contrasting term "established" in § 1348, and (3) this Court's construction of "located" in a parallel venue statute in *Citizens & S. Nat'l Bank v. Bougas*, 434 U.S. 35, 98 S. Ct. 88, 54 L. Ed. 2d 218 (1977). Pet. App., p. 1a - 32a. Moreover, the Fourth Circuit's decision is supported by the application of the *in pari materia* canon to the statutory term of "located" in 28 U.S.C. § 1348. For all of the following reasons, this Court should deny review of the Fourth Circuit's decision.

I. CIRCUIT SPLITS REGARDING DIVERSITY JURISDICTION ARE NOT EXTRAORDINARY.

Petitioner asserts the questions presented are ripe for consideration by this Court because the Fourth Circuit disagrees with the analyses of the Fifth and Seventh Circuit Courts of Appeals. Pet., p. 9. However, entities often endure different treatment depending upon the location of the proceeding within the federal courts of appeals.

Several recent federal court opinions involving diversity jurisdiction focus on the federal courts' continuing adherence to Congress' intent to restrict a party's access to federal court. Not surprisingly, various circuits have reached inconsistent conclusions, giving rise to splits of authority on issues such as diversity jurisdiction. Such division among the courts of appeals does not necessarily, or automatically, give rise to an important or exceptional circumstance justifying this Court's review.

In fact, the citizenship of entities for purposes of diversity jurisdiction is often an issue in which the circuit courts are divided. To explain, 28 U.S.C. § 1332(c)(1) addresses the issue of corporate citizenship, providing that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." *See* 28 U.S.C. § 1332(c)(1) (2000). A corporation is not a citizen of *either* its state (or states) of incorporation *or* principal place of business, but instead, is a citizen of *both* states. Courts use a number

of *different* approaches in determining a corporation's principal place of business.

The First and Seventh Circuits apply the "nerve center" test, which determines the principal place of business by looking to where the management and policy-making activities take place. *See, e.g., Topp v. CompAir Inc.*, 814 F.2d 830, 834 (1st Cir. 1987); *Metro. Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991). In contrast, the Third and Fifth Circuits apply the "place of activity" test which looks to the center of the corporation's production and service activities. *See, e.g., Kelly v. U.S. Steel Corp.*, 284 F.2d 850, 854 (3d Cir. 1960); *Harris v. Black Clawson Co.*, 961 F.2d 547, 549 n.4 (5th Cir. 1992). Finally, many courts apply the "total activity" test, treating it as a hybrid of the first two. *See, e.g., Amoco Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909 (10th Cir. 1993), *cert. denied*, 510 U.S. 1112, 114 S. Ct. 1057, 127 L. Ed. 2d 377 (1994); *Bel-Bel Int'l Corp. v. Community Bank of Homestead*, 162 F.3d 1101, 1106-07 (11th Cir. 1998).

There also is a circuit split regarding the citizenship of defunct corporations. The Second Circuit takes the strictest approach finding a defunct corporation's citizenship is determined "not only by its state of incorporation but also by the place it last transacted business." *See Wm. Passalacqua Builders, Inc. v. Resnick Developers S. Inc.*, 933 F.2d 131, 141 (2d Cir. 1991). The Third Circuit, on the other hand, has adopted the view that an inactive corporation has no principal place of business and, accordingly, is only a citizen of the state of incorporation. *See Grand Union Supermarkets of the Virgin Islands, Inc. v. H.E. Lockhart*

Management, Inc., 316 F.3d 408 (3d Cir. 2003); and *Midlantic Nat'l Bank v. Hansen*, 48 F.3d 693, 696 (3d Cir. 1995).

Respondents submit the division among the courts of appeals on the interpretation of the statutory word "located" for diversity purposes does not necessarily, or automatically, give rise to an important or exceptional circumstance justifying this Court's review. The current climate indicates the present legal issue is in a state of flux and would benefit from further consideration by the courts of appeals and district courts.

Finally, Petitioner goes to great lengths to show the demographic information for federally-insured institutions. However, Petitioner failed to show how national banks would be prejudiced from having their cases heard in state courts, such as South Carolina's state court, particularly when the very demographic information cited indicates the Petitioner has 176 branch offices in South Carolina. Pet., p. 9. National uniformity on this particular issue of diversity jurisdiction is not essential to warrant review of the federal diversity jurisdiction issue.

II. THIS COURT PREVIOUSLY DENIED *CERTIORARI* ON THE QUESTION PRESENTED BY PETITIONER

This Court previously denied *certiorari* on the issue of whether branch banking in a state other than a national bank's principal place of business gives rise to citizenship in the state where the branch bank is

located. In *Southland Mobile Homes of South Carolina, Inc. v. Associates Fin. Serv. Co., Inc.*, 270 S.C. 527, 244 S.E.2d 212 (S.C. 1978), *cert. denied sub nom.*, 439 U.S. 900, 99 S. Ct. 266, 58 L. Ed. 2d 248 (1978), Southland brought a suit against Mellon Bank, N.A. (Mellon Bank) to recover damages for breach of contract. Mellon Bank was a national banking association organized under the provisions of Title 12 of the United States Code.

One of the issues before the South Carolina Supreme Court was whether Mellon Bank, with its principal place of business in Allegheny County, Pennsylvania, was "located" in Sumter County, South Carolina, for purposes of jurisdiction under 28 U.S.C. § 1348. The court in *Southland* elaborated on the meaning of an authorized branch. It was decided Mellon Bank conducted "branch banking" in South Carolina and that it was therefore "located" there based upon the finding that Mellon Bank had received checks, loaned money and conducted all other business necessary for the receipt and disbursement of funds through the office of an authorized agent, Associates Financial Services Company, Inc., in Sumter County, South Carolina. These transactions were conducted pursuant to the explicit directions of the Mellon Bank.

The South Carolina Supreme Court went on to hold that because Mellon Bank had a branch bank in Sumter County, South Carolina, it was "located" there for jurisdictional purposes pursuant to 28 U.S.C. § 1348. *Id.* at 532. Mellon Bank filed a petition for *certiorari*, which this Court denied. *See Mellon Bank, N.A. v. Southland Mobile Homes of S.C., Inc.*, 439 U.S. 900, 99 S. Ct. 266, 58 L. Ed. 2d 248 (1978).

III. THE QUESTION PRESENTED IS NOT RIPE FOR CERTIORARI

The Fourth Circuit's decision relates to the construction of a federal statute. There is no need for this Court to review such an interpretation when (1) Congress is well able to clarify or enact specific statutory language concerning jurisdictional issues as it deems appropriate; and (2) recent activity before Congressional Committees indicates Congress may be willing to clarify or specify the citizenship of federal lending institutions.

First, other federal statutes dealing with lending institutions indicate Congress is fully capable of addressing where a lending institution is "located" for purposes of diversity jurisdiction. One example can be found in 12 U.S.C. § 2258, which deals with the Farm Credit System (a type of lending institution), which states:

> Each institution of the System shall for the purposes of jurisdiction be deemed to be a citizen of the State, commonwealth, or District of Columbia in which its **principal office is located**. (Emphasis added).

Second, a bill recently passed in the United States House of Representatives and currently in a Senate committee shows Congress may specify the location of lending institutions such as national banks for diversity jurisdiction purposes. In March 2004, the House passed H.R. 1375, entitled the *Financial Services Regulatory Relief Act*, which purports to reduce the

regulatory burden on financial services firms and improve productivity for insured depository institutions.

In particular, H.R. 1375, 108th Cong. § 213 (2004),[2] seeks to amend the Home Owners' Loan Act, 12 U.S.C. § 1464, by adding the following subsection:

> (x) HOME STATE CITIZENSHIP - In determining whether a Federal court has diversity jurisdiction over a case in which a Federal savings association is a party, the Federal savings association shall be considered to be a citizen only of the State in which such savings association has its home office.

As shown by the current enactment of 12 U.S.C. § 2258, and the proposed amendment to 12 U.S.C. § 1464 (through H.R. 1375), Congress is cognizant of the ways in which it could specify the word "located" for purposes of diversity jurisdiction. In fact, recent testimony before the Congressional Committee on Banking, Housing and Urban Affairs indicates the very question presented to this Court has been brought to the attention of Congress. *See The Financial Services Roundtable: Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. (2004) (Statement of William A. Longbrake, p. 5-6). Specifically, on June 22,

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[2] *See also* S. 1812, 108th Cong. (2003), a bill previously introduced in the Senate which proposes the identical amendment discussed in H.R. 1375.

2004, the Committee on Banking, Housing and Urban Affairs heard the following testimony:

> [F]urther clarification also may be needed to update the existing provision that specifies which state a national bank is **located** for purposes of federal court jurisdiction.

Id., at p. 6 (Emphasis added).

In holding the citizenship of limited partners had to be taken into account to determine diversity of citizenship among the parties in action brought by limited partnership, this Court has stated:

> [T]he course we take today does not so much disregard the policy of accommodating our diversity jurisdiction to the changing realities of commercial organization, as it honors the more important policy of leaving that to the people's elected representatives. Such accommodation is not only performed more legitimately by Congress than by courts, but it is performed more intelligently by legislation than by interpretation of the statutory word "citizen."

See Carden v. Arkoma Assoc., 494 U.S. 185, 197, 110 S. Ct. 1015, 108 L.Ed.2d 157 (1990).

In the present case, the Fourth Circuit stated:

> [W]e hold that a national banking association is "located" under section 1348 in any state where it operates branch offices. *** If the statute as written does not effectuate Congress' preference as to forum for such disputes as this, Congress may amend the statute. But for the courts to legislate such an amendment would be both to usurp the role of the legislature and to abdicate the role assigned to the judiciary.

Pet. App., pp. 31a-32a. Congress may take action to specify in which state a national bank is located for purposes of federal court jurisdiction, thereby preventing this Court from being forced to judicially amend the statute in an effort to anticipate what language Congress actually enacted. Respondent requests this Court deny Petitioner's request for review pending Congressional specification on the question presented.

IV. THE ORDINARY MEANING OF "LOCATED" IS NOT AMBIGUOUS, BUT INSTEAD, SUGGESTS A NATIONAL BANK IS "LOCATED" WHEREVER IT HAS PHYSICAL PRESENCE

The Fourth Circuit did not implicitly assume 28 U.S.C. § 1348 is an unambiguous statute, nor did it overlook the broader context in which the statute

appears. As opposed to a mere assumption, the majority opinion made a detailed determination of the plainness of the statutory language in § 1348. The court of appeals analyzed (1) the ordinary meaning of "located," (2) its use in juxtaposition with the contrasting term "established" in § 1348, and (3) the Supreme Court's construction of "located" in a parallel venue statute in *Citizens & S. Nat'l Bank v. Bougas*, 434 U.S. 35, 98 S. Ct. 88, 54 L. Ed. 2d 218 (1977).

The majority opinion correctly found there was no ambiguity in the *ordinary* meaning of the word "located." Pet. App., p. 5a. It is an axiom of statutory interpretation the plain meaning of an unambiguous statute governs, barring exceptional circumstances. *See Rubin v. United States*, 449 U.S. 424, 101 S. Ct. 698, 66 L. Ed. 2d 633 (1981). Where, as here, the statute does not provide an express definition for the term in question, the courts construe the statutory term in accordance with its ordinary or natural meaning. *See FDIC v. Meyer*, 510 U.S. 471, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994).

In ordinary parlance, the word "located" is a general term referring to physical presence in a place. A national banking association becomes physically present in a state when it opens branch offices and conducts business in that state. *See, e.g.*, 12 U.S.C. § 92 (authorizing any national bank "*located and doing business* in any place the population of which does not exceed five thousand inhabitants" to operate as an insurance agent) (emphasis added)).

In 1948, when § 1348 was re-codified in Title 28, and in 1887,[3] when the phrase "citizens of the States in which they are respectively located" was first added to the predecessor statute to § 1348, the word "located" referred to physical presence in a place. Pet. App., pp. 4a-5a. Petitioner's assertion that the word "located" is ambiguous is without merit since no definition or *ordinary* meaning of the word "located" requires the "particular or specific location" be unique or exclude other distinct locations. Furthermore, the definitions cited by the Seventh Circuit actually supports the Fourth Circuit's conclusion the word "located" unambiguously includes *branch offices*. Pet. App., pp. 6a-7a.

In analyzing the specific context in which "located" is used within § 1348, the majority opinion looked at the statute's use of two distinct terms to refer to the presence of a banking association: "established" and "located." Pet. App., p. 8a. "It is a principle of statutory interpretation that different words used in the same statute should be assigned different meanings whenever possible." *See, e.g., Cunningham v. Scibana*, 259 F.3d 303, 308 (4th Cir. 2001).

The Fourth Circuit concluded the place where a national bank is "established" refers to the bank's charter location and the place where it is "located" refers to the place or places where it has a physical

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[3] *See e.g.*, 22 Stat. 162, 163 (1882) ("the 1882 Act"); 24 Stat. 552 ("the 1887 Act"); 25 Stat. 433 (1888)(corrective text); 36 Stat. 1091 (1911); and 28 U.S.C. § 1348 (1948 re-codification of current statute)

presence. It is reasonable to give independent meaning to the distinct terms in § 1348, particularly since the Supreme Court attributed the same two definitions to "established" and "located" in the former venue statute for national banks. *Citizens & S. Nat'l Bank v. Bougas*, 434 U.S. 35, 98 S. Ct. 88, 54 L. Ed. 2d 218 (1977); *see also* 12 U.S.C. § 30(b) (A national bank is originally and permanently *established* at its main office, which cannot be moved more than thirty miles outside the city of its original location, and even then only with approval of two-thirds of the shareholders and the Comptroller of the Currency); and 12 U.S.C. § 36(i) (A bank is thereafter and temporarily *located* at its branch office, which it can open and move at will, subject to the approval of the Comptroller).

Examining the broader context of § 1348 as a whole, the majority and dissent opinions agree 28 U.S.C. § 1348, and former 12 U.S.C. § 94 (the venue statute discussed in *Bougas*), both concern the same relevant subject matter – i.e., whether a national bank may initiate suit or be sued in federal court. Pet. App., pp. 15a, 42a-43a.

This Court construed the word "located" in former 12 U.S.C. § 94 to be distinct from the word "established" when used in the same statute. *Bougas, supra,* 434 U.S. at 44. Furthermore, this Court did not read the word "located" to mean *only* the principal place of business. *Id.,* 434 U.S. at 43-44. The Fourth Circuit rejected the notion the place in which a bank is "located" could fairly be understood to refer to the place where it primarily or principally conducts business. Pet. App., pp. 10a-11a.

Thus, when the word "located" is read in its plain and ordinary meaning, in the specific context of § 1348, and in the broader context of other statutes, it is clear the Fourth Circuit correctly concluded "located" is unambiguous.

V. PETITIONER'S "JURISDICTIONAL PARITY" ARGUMENT LEADS TO A PATENTLY UNREASONABLE INTERPRETATION OF 28 U.S.C. § 1348.

Petitioner would have this Court believe the Fourth Circuit's decision should be reviewed to correct the apparent disregard of this Court's decisions regarding § 1348 and its predecessors. However, this assertion, which is purportedly supported by Petitioner's jurisdictional parity argument, fails for several important reasons.

Petitioner asserts the Fourth Circuit's decision cannot be reconciled with Congress' intention to maintain jurisdictional parity between national banks and other corporations. Pet., pp. 11-14. As stated above, the Fourth Circuit correctly found § 1348 was unambiguous and such finding does not warrant a review of Congress' legislative purpose. *See Robinson, supra,* 519 U.S. at 340.

Petitioner also asserts the Fourth Circuit's decision fails to appreciate the history of § 1348 which indicates Congress' intent to maintain jurisdictional parity between national banks and state banks and other corporations. Pet., pp. 11-14. Even assuming the statutory history of § 1348 reveals its purpose was to

accord national banks the same access to the federal courts as that enjoyed by state banks and corporations, such principle would only guarantee that national banks are subject to the rules of diversity jurisdiction, instead of automatically triggering federal question jurisdiction on the basis of a federal charter. *See Petri v. Commercial Nat'l Bank of Chicago*, 142 U.S. 644,648, 12 S. Ct. 325, 35 L. Ed. 1144 (1892) (noting the purpose of the 1882 Act was to eliminate federal "arising under" jurisdiction for suits involving national banks).

To the extent the statutory history of § 1348 places national banks on "parity" with state banks and corporations, it does so only in the limited sense that the access of all three to the federal courts would now be determined by their *citizenship* in various states – rather than by the existence of a federal charter. Pet. App., p 25a – 27a. Nothing in *Petri* can be construed to require the same rules regarding the technical qualifications for state citizenship must apply both to national banks and to corporations. This is true because the *Petri* court could not have envisioned a national bank's ability to be a citizen of more than one state through branch offices. *See Bougas, supra*, 434 U.S. at 43.

Petitioner, as well as the dissent and the Fifth and Seventh Circuits rely upon the following language from *Petri* to support its principle of jurisdictional parity:

> No reason is perceived why it should be held that congress [sic] intended [in the predecessor to § 1348] that national banks should not resort to federal tribunals as other corporations and individual citizens might do.

Petri, 142 U.S. at 650-51; *see also Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001); and *Horton v. Bank One*, 387 F.3d 426 (5th Cir. 2004). This language and the holding of *Petri* establishes only the general conclusion that federal courts could exercise diversity jurisdiction over national banks, just as they do over corporations and individual citizens. This language, however, does not support the specific conclusion that the identical *criteria of state citizenship* must apply to national banks.[4]

"The 1882 Act and the 1887 Act were designed to overcome the effect of [prior statute], which allowed national banks to sue and be sued in the federal district and circuit courts solely because they were national banks, without regard to diversity..." *See Mercantile Nat'l Bank at Dallas v. Langdeuau*, 371 U.S. 555, 565-566, 83 S. Ct. 520, 9 L. Ed. 2d 523 (1963). Cases such as *Langdeuau* and *Petri* merely confirm Congress' intent in the 1882 and 1887 Acts to establish "parity" in the limited sense of abolishing automatic federal question jurisdiction for suits involving national banks.

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[4] The Fourth Circuit determined Petitioner's out-of-context quotation of *Petri* misleadingly implied the criteria of state citizenship of corporations (i.e. citizenship based on principle place of business) must apply to national banks. Pet. App., p 29a.

In *Continental National Bank of Memphis v. Buford*, 191 U.S. 119, 123-124, 24 S. Ct. 54, 56, 48 L. Ed. 119, this Court held:

> The necessary effect of [Sec. 4 of the 1882 Act] was to make national banks *** citizens of the states in which they were respectively located, and to withdraw the right to invoke jurisdiction of the circuit courts of the United States simply on the grounds that they were created by, and exercised their powers under, acts of Congress. **No other purpose can be imputed to Congress than to effect that result.**

(Emphasis added). As this Court's precedent reveals, the legislative history of 28 U.S.C. § 1348 indicates an intent to **reduce** federal court jurisdiction. It is illogical to assume Congress also intended to expand federal jurisdiction when locally present national banks invoke diversity jurisdiction against other local citizens. Since this Court has held § 1348 and its predecessors were enacted to limit federal court jurisdiction, then § 1348 should not be interpreted in a manner which expands such jurisdiction, particularly when there is no concern for local bias.

According to the FDIC Institution Directory, Petitioner has 176 branch offices in South Carolina. Thus, there can be no fear by Petitioner that state courts would be prejudiced against national banks (as an out-

of-state party) when the national bank has 176 branches in the state. *See* FDIC Institution Directory, http://www2.fdic.gov/idasp/main.asp (last visited May 13, 2005) (providing demographic information about federally-insured institutions, current as of May 12, 2005). This Court previously limited diversity jurisdiction when Congress' original purpose, namely to protect out-of-state litigants from local prejudice in state courts, is no longer necessary due to advancements in travel, communication and globalization. *See Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945).

VI. APPLICATION OF THE *IN PARI MATERIA* CANON APPROPRIATELY RESOLVES THE ISSUE.

Statutes that are *in pari materia* or relating to the same subject matter are to be interpreted in light of, and consistently with, one another. *See United States v. Stewart*, 311 U.S. 60, 61 S. Ct. 102, 85 L. Ed. 40 (1940). This interpretive principle is applicable when the two statutes adopt a single consistent vocabulary in reference to the same subject matter. *See, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 990 S. Ct. 2066, 60 L. Ed. 2d 609 (1979).

It is undisputed at the time Congress established and reenacted § 1348, it adopted the same vocabulary – the terms "established" and "located" – to refer to the same subject matter, namely the location of national banking associations in relation to their capacity for

suit, as did the former venue statute (12 U.S.C. § 94).[5] Since this Court in *Bougas* provided the definitive construction of those terms in the venue statute, the *in pari materia* canon directs the adoption of the same construction for the jurisdiction statute.

Petitioner asserts the *in pari materia* canon should not apply because there are basic and historic differences between the concepts of subject matter jurisdiction and the concept of venue. However, the *relevant* subject matter in the venue and diversity jurisdiction statutes is identical in that both concern whether a national bank may initiate suit or be sued in federal court.

The observation that venue serves litigants' convenience, while diversity jurisdiction is concerned with bias, does not defeat the application of the canon. Courts have never insisted on such absolute identity of purpose; otherwise, no two statutes would ever be sufficiently similar to warrant application of the canon. *See, e.g., Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964) (patent law and antitrust law are *in pari materia*); *Hallenbeck v. Penn. Mut. Life Ins. Co.*, 323 F.2d 566, 571 (4th Cir. 1963) ("It is well established that statutes which relate to the same persons or things, or the same class of persons or things, *or* have a common purpose may be regarded as 'in pari materia.'")(Emphasis added).

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[5] As the Fourth Circuit correctly determined, subsequent amendment or repeal of a statute generally does not render it irrelevant to *in pari materia* analysis. Pet., p. 14a, n. 2.

The canon is applicable if it is natural and reasonable to think Congress, in specifying the presence of national banks to determine their capacity to sue and be sued in federal courts, would use the words "established" and "located" consistently in the two statutes. *See* 2B *Sutherland's Statutory Construction* § 51.03, at 212. In the alternative, the Fourth Circuit relied on *Overstreet v. North Shore Corp.*, 318 U.S. 125, 129-130, 63 S. Ct. 494, 87 L. Ed. 656 (1943) for the proposition that identical words, even occurring in *unrelated* statutes, should be interpreted to have identical meanings whenever reasonably possible. Pet. App. P. 17a.

This Court should deny Petitioner's request for review since the Fourth Circuit appropriately applied the *in pari materia* canon to 28 U.S.C. § 1348 in order resolve the question presented in favor of Respondents.

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

WACHOVIA BANK, NATIONAL ASSOCIATION,

Petitioner,

v.

DANIEL G. SCHMIDT III, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondents *acknowledge* that the circuits are in conflict on the meaning of 12 U.S.C. § 1348; they recognize that the issue is squarely presented in this case; and they do not deny that the question presented here is a recurring one of great practical importance. They are left with no plausible argument against review by this Court and, not surprisingly, have advanced none.

1. Because respondents concede that "the Fourth Circuit disagrees with the analyses of the Fifth and Seventh Circuit Courts of Appeals" (Br. in Opp. 8), they must rest their opposition to the petition on the assertion that "[t]his Court need not be compelled to address every such division simply because the question is one of federal jurisdiction." *Id.* at 6. That may be so, but this case is the paradigm of one in which review by this Court is appropriate.

The conflict in the courts of appeals is ripe for resolution: the arguments on both sides are thoroughly canvassed in scholarly opinions by the majority and dissent below, as well as in the decisions of the Fifth and Seventh Circuits. Moreover, as we showed in the petition (at 7 n.3), the issue has been extensively litigated in district courts across the Nation. And the Office of the Comptroller of the Currency has weighed in several times, elaborating its view that national banks should not be treated as citizens of every state in which they have a branch. See *id.* at 6-7. In these circumstances, there is nothing to be gained – and much to be lost, in the form of wasteful, repetitive, forum-shopping litigation – from delaying resolution of the conflict.

Respondents get no further in asserting that "[n]ational uniformity on this particular issue of diversity jurisdiction is not essential." Br. in Opp. 10. As the volume of reported appellate and district court decisions on the point makes

graphically clear, the issue presented here arises with considerable frequency. And absent a uniform national rule, forum-shopping, inconsistent treatment of identically situated litigants – and, indeed, inconsistent treatment of the *same* litigant in different parts of the country – will be inevitable. For these reasons, this Court has regarded itself as having a special responsibility to assure uniformity and resolve conflicts concerning the jurisdiction of the federal courts. See R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE 252-253 (8th ed. 2002); see also Pet. 10-11 (citing cases in which the Court has granted review to resolve conflicts concerning the rules governing diversity jurisdiction). The Court should take that step here.

2. Respondents also contend that review is unnecessary because Congress could revisit the rules governing the citizenship of national banks. In support of this argument, they assert that the House of Representatives "recently" passed a bill that "shows Congress may specify the location of lending institutions such as national banks for diversity jurisdiction purposes." Br. in Opp. 12. This argument is wrong on two fronts. The cited bill, H.R. 1375, 108th Cong., § 213 (2004), actually passed the House more than a year ago and died at the end of the 108th Congress. And the bill, in any event, had no implications for the current controversy. It concerned the citizenship of federal savings associations, a matter not addressed in any federal legislation; it did *not* address the citizenship of national banks. Legislation affecting the citizenship of national banks was not considered in the last Congress and has not been introduced in the current Congress.

As for the broader suggestion that this Court should not intervene because Congress has the authority to modify federal legislation in response to erroneous statutory decisions by the lower courts, it plainly is without merit. Such an approach would lead this Court *never* to review conflicts in the

courts of appeals concerning the meaning of federal statutes. Needless to say, that has not been the Court's practice.[1]

3. The bulk of respondents' brief is devoted to a lengthy and vigorous defense of the substance of the Fourth Circuit's analysis of Section 1348. Br. in Opp. 15-25. The contentions advanced by respondents are addressed in some detail in the petition (at 11-18) and in Judge King's dissent below (at Pet. App. 34a-46a), and we will not repeat that discussion here. The pertinent point for present purposes is that respondents' contentions relating to the proper interpretation of Section 1348 are immaterial to the decision whether to address the circuit conflict. Each of the arguments now advanced by respondents was considered, addressed, and rejected by the Fifth and Seventh Circuits. Whatever the plausibility of respondents' view of the merits, resolution of the existing conflict in the courts of appeals remains imperative. While respondents' analysis of Section 1348 offers them a healthy head start to their briefing of the merits in the event that the Court grants review, that analysis offers no reason for the Court to deny certiorari.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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[1] Respondents likewise get no support from the fact that over a quarter-century ago the Court declined to review the decision of the South Carolina Supreme Court in *Southland Mobile Homes of South Carolina, Inc.* v. *Associates Fin Serv. Co., Inc.*, 244 S.E.2d 212 (S.C.), cert. denied sub nom. *Mellon Bank, N.A.* v. *Southland Mobile Homes of South Carolina, Inc.*, 439 U.S. 900 (1978). The issue presented to the Court in that case concerned the interpretation of 12 U.S.C. § 94 and had nothing to do with federal diversity jurisdiction. See 439 U.S. at 900-903 (Blackmun, J., dissenting from the denial of certiorari). In any event, that decision predated the current conflict in the federal courts about the meaning of Section 1348 by some 25 years.

Respectfully submitted.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER WACHOVIA BANK, N.A.

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QUESTIONS PRESENTED

The questions presented are (i) whether, for purposes of federal diversity jurisdiction, a national banking association is "located" in, and thus deemed to be a citizen of, every state in which the association maintains a branch, as held by the court below, or instead has a more limited citizenship, as held by three other courts of appeals; and (ii) whether the word "located," as used in 28 U.S.C. §1348, is ambiguous.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 04-1186

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v.

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Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMERICAN BANKERS ASSOCIATION[1] AS AMICUS CURIAE SUPPORTING PETITIONER WACHOVIA BANK, N.A.

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[1] Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored this brief in whole or in part, and no person or entity, other than ABA and its members, made a monetary contribution to the preparation or submission of the brief.

With the written consent of the parties, originals of which have been filed with the Clerk, the American Bankers Association hereby respectfully submits this brief as amicus curiae.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association ("ABA") is the principal national trade association of banks throughout the United States. It has members in each of the fifty states and the District of Columbia and includes financial institutions of all sizes and types – money center, regional, community, commercial and savings banks. ABA's members hold approximately 90% of the domestic assets of the banking industry in the United States. The ABA frequently appears in litigation as either a party or as *amicus curiae* where the issues raised in a case are of widespread importance and concern to the industry.

The resolution of the legal question of where a national bank is "located" for the purposes of federal diversity jurisdiction, *see* 28 U.S.C. § 1348, will affect one of the most fundamental rights accorded to citizens of the United States: access to federal courts in cases involving disputes between citizens of different states. The present case has direct applicability to the members of ABA.

ABA respectfully submits that the court's understanding and analysis of the issues in this case will benefit from a submission by this amicus, as it is in a position to present to the Court a comprehensive assessment of how an adverse decision will place national banks at a decided disadvantage in comparison to state-chartered institutions with respect to access to federal courts, and the potential disruption that will result if the lower court's opinion is upheld.

STATEMENT OF THE CASE

For more than a century, the settled rule has been that federally chartered banks should have the same access to federal courts as state chartered banks. Since 1882, the United States Congress has, through various enactments, consistently adopted legislation that expressly adheres to the basic notion that national banks and state-chartered institutions shall be on an equal footing with respect to access to federal courts, and that district court jurisdiction over lawsuits involving national banks "shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States...." *Act of July 12, 1882*, 22 Stat. 162, 163.

Under the lower court's decision, national banks' opportunities for access to federal courts will effectively be destroyed in the majority of cases because, unlike their state-chartered counterparts, they are deemed to be citizens of every state in which they have a branch. This flawed construction of 28 U.S.C. § 1348 will mean that state banks can bring or remove to federal court the numerous matters involving their retail banking customers in all states (except in their "home" state which hosts their main office) where they have branches[2] and, therefore where they have the customers, while similarly-situated national banks will be compelled to litigate in state court the myriad of issues that do not present federal questions – including state-law restrictions on national banks that give rise to federal

[2] *See* 28 U.S.C. § 1332(c)(1) ("a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business...").

preemption defenses.[3] Instead of maintaining parity between national banks and state banks – or other corporate entities, for that matter – the lower court's decision singles out national banks for disparate treatment.

The decision below will also have a significant impact upon pending litigation within the federal system, at both the trial and appellate levels. If the Court were to adopt the lower court's restrictive interpretation regarding the corporate citizenship of national banks, the result will force the remand or dismissal of scores of existing cases, many ripe for decision, where the parties have invested years of time and treasure litigating in a federal forum. Indeed, the history of this case amply demonstrates the potential for disruption latent in the lower court's decision.

The Court should reverse the lower court's decision and restore what has been the longstanding operative rule with respect to federal court jurisdiction for the nation's banking institutions: equality between state and federal charters.

A. Interstate Branch Banking Is A Recent Phenomenon For National Banks.

Banking and the way in which banking products and services are made available to the public have changed enormously in the last 20 years. The advent of advanced technology and the evolution of the nation's banking laws have produced a revolution in the way in which the American public conducts its banking. One hundred years ago, most banks conducted their business from their main

[3] *But see*, *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003)

office, meaning that if a customer wanted to make a deposit, cash a check, or obtain a loan, their choices were limited to an institution that was physically located nearby. At that time, a bank offering the convenience of multiple offices or "branches" was almost unheard of, and the ability to conduct banking business on virtually any street corner in any major city via an ATM would have been considered a flight of fancy.

At the end of the nineteenth century, only 5 national banks and 82 state-chartered banks operated branches, with a total of 119 branches. By the end of 1923, however, there were 91 national and 580 state banks with a total of 2,054 branches. *First National Bank v. Walker Bank*, 385 U.S. 252, 257 (1966), *citing* Board of Governors of the Federal Reserve System, Banking Studies 15, 428 (1941). As state laws were liberalized to permit branching, the number of bank branch offices steadily began to climb. Despite years of steady growth, however, the number of branch offices did not outstrip the number of main offices until the mid-1960s.[4] Today, the number of branch offices in the United States *far* exceeds the number of main banking offices.[5] According to the Federal Deposit Insurance Corporation ("FDIC"), as of December 31, 2004, there were 76,579

[4] FDIC Statistics on Banking: *A Statistical Profile of the United States Banking Industry,* December 31, 2004, at A-2.

[5] *Id.* According to the FDIC, the number of bank "main offices" has declined since the 1930's, dropping from 14,146 in 1934 to 7,630 as of December 31, 2004.

banking offices of all types in the United States.[6] Of this number, 68,949 were classified as branch offices.[7]

The ability of banks to expand their operations beyond their home office and establish branches was an innovation pioneered by state banks. State laws were amended to permit state-chartered institutions to move beyond the "unit banking" model and to expand their operations by opening branches within their home state. Congress, however, for decades did not see fit to grant national banks comparable authority and the ability of national banks to compete with their state chartered counterparts suffered as a result. Indeed, intrastate branching proved so successful at the state level that by the mid-1920's it was believed that intrastate branching by state chartered institutions posed a threat to the continued viability of the national banking system. The Comptroller of the Currency, in his *Annual Report of 1923*, recommended congressional action on branch banking. The report stated that if state banks continue to engage "in unlimited branch banking it will mean the eventual destruction of the national banking system . . . ." H. R. Doc. No. 90, 68th Cong., 1st Sess., 6 (1924).

Congress reacted to this threat in 1927 when it passed the *McFadden Act*, 44 Stat. 1224 (1927). The *McFadden Act*, in general terms, authorized national banks (and state banks which were members of the Federal Reserve System) to branch in municipalities where state banks were permitted to branch under state law. *Walker Bank*, 385 U.S. at 258. The *McFadden Act* was

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[6] *Id.*

[7] *Id.*

subsequently amended by the *Banking Act of 1933 (Glass-Steagall Act)*, 48 Stat. 189, 190 (1933), which brought the state and national charter into near complete alignment regarding the authority to establish branches within a bank's home state. The *Banking Act of 1933* permitted national banks to establish intrastate branches on the same terms as state banks under state law. *See Walker Bank*, 385 U.S. at 260. But because no state allowed branching outside of its home state, the *McFadden Act* effectively imposed the same restriction on national banks.

The power to operate branches across state lines, *i.e.*, interstate branching, remained beyond the authority of national banks for the next sixty years. Indeed, prior to the passage of the *Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994*,[8] Congress had actively sought to address attempts to evade the limitations of the *McFadden Act* and state branching laws by bank holding companies. Congress passed the *Bank Holding Company Act of 1956*, 70 Stat. 133, as amended, 12 U.S.C. 1841 et seq., which contained a provision known as the *Douglas Amendment*, 12 U.S.C. 1842(d), which prohibited the Board of Governors of the Federal Reserve from approving an application of a bank holding company or bank located in one State to acquire a bank located in another State unless the acquisition was specifically authorized by the laws of the State in which such bank was located. From 1956 to 1972, the *Douglas Amendment* had the effect of completely barring interstate bank acquisitions because no State had enacted the requisite authorizing statutes. These

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[8] Pub. L. No. 103-328, Title I, 108 Stat. 2338, 2349, 2352, which relaxed prior barriers to interstate branching by both national and state banks (amending, *inter alia*, 12 U.S.C. §§ 36 & 1842(d)).

restrictions were upheld in the Court's 1985 decision in *Northeast Bancorp v. Board of Governors*, 72 U.S. 159 (1985), which held that States could establish and enforce regional interstate banking compacts that controlled branching within their borders.[9]

Authority for truly significant interstate branching did not arrive for national banks until 1994, with the passage of the *Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994*. The statute repealed the *Douglas Amendment* and the *McFadden Act* and opened the door for national banks to operate branches in numerous states after June 1, 1997. The number of branches currently operated by national banks represents a very significant portion of the total banking offices and branches within the United States. According to the Federal Deposit Insurance Corporation, as of December 31, 2004, there were 1,906 national banks operating 36,813 branches within the 50 States and the District of Columbia.[10] The ten largest national banks in the United States (based on asset size) now operate a total of 20,031 branches. As a group, on average they have established a presence in over 15 different jurisdictions.[11] Bank of America, has offices

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[9] It was also not uncommon during this period for a bank holding company to expand its name and operations beyond its "home" state by chartering individual de novo banks in each jurisdiction. These institutions are not branches, they are separate banking charters.

[10] *Id.*, at B-16.

[11] *See* Appendix A. Federal Deposit Insurance Corporation (FDIC), *Institution Directory*, http://www2.fdic.gov/idasp/main.asp.

located within 30 jurisdictions across the United States, while the petitioner in this case, Wachovia Bank, NA, operates 3,331 branches located in 16 different jurisdictions. One should not assume, however, that interstate branching is the exclusive province of larger institutions. For example, on a much smaller scale, the Adams National Bank (total assets, $246 million, total offices: 7), whose main office is located in Washington, DC, has established an interstate branch in Maryland.[12]

B. Congress Established Jurisdictional Parity Between State Chartered Institutions And National Banks.

Turning to 28 U.S.C. § 1348 as it affects the grant of federal court jurisdiction for cases involving national banks – one point quickly becomes apparent: until the passage of *Riegle-Neal* in 1994, the law governing the "citizenship" of national banks for purposes of establishing diversity jurisdiction evolved at a time when national banks either lacked the authority to branch at all, or branching was limited to an expansion within the state that hosted the institution's main office. With one or two isolated exceptions, interstate branching simply did not exist for national banks, and the question of whether the existence of branch offices were to be taken into consideration for the purpose of determining the "location" of a national bank under 28 U.S.C. § 1348 and its predecessors when divining an institution's "citizenship" for establishing diversity jurisdiction under 28 U.S.C. § 1332 rarely was an issue.

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[12] Federal Deposit Insurance Corporation (FDIC), *Institution Directory* (as of March 31, 2005) (www2.fdic.gov/idasp/ez_find_summary_office.asp?cert=22658&Refer=).

However, as will be discussed below, it is equally apparent that while interstate branching was not a factor in drafting the language used in the historical predecessors to 28 U.S.C. § 1348, Congress during this period was operating from the basic position that legislation such as the *McFadden Act* and the *Banking Act of 1933,* which opened up limited branching for national banks, was "intended to place national and state banks on a basis of "competitive equality" insofar as branch banking was concerned." *Walker Bank*, 385 U.S. at 261. The cases interpreting the historical predecessors to 28 U.S.C. § 1348 all reflect that this basic notion of parity included equal access to federal courts. Indeed, the jurisprudence includes a case, *American Surety Co. v. Bank of California*, 133 F.2d 160, 162 (9th Cir. 1943), that presented a rare pre-*Riegle-Neal* situation where a national bank with an interstate branch was sued in federal court. In that case, diversity jurisdiction was upheld despite the fact that the bank had a branch in the same state as the plaintiff.

More recent cases – *Horton v. Bank One, N.A.*, 387 F.3d 426 (5th Cir. 2004) and *Firstar Bank, N.A. v. Faul*, 253 F.3d 982, 986 (7th Cir. 2001) – have continued to understand that maintaining parity between national and state bank charters has always been a congressional purpose behind 28 U.S.C. § 1348 as well as predecessor statutes. This interpretation is also in accord with the interpretation of the statute that has been adopted by the federal agency that charters and regulates national banks – the Office of the Comptroller of the Currency. *See OCC Interpretive Letter No. 952* (2002 WL 32072482, October 23, 2002).

C. The Historical Interpretation Of The Statute Emphasizes Parity Between National And State Charters.

Federal diversity jurisdiction was created by Congress to "provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants." *Exxon Mobil Corp. v. Allapattah Services, Inc.* 125 S. Ct. 2611, 2618 (2005). Given their federal origin and the hostility that was shown to national banks within the States, Congress extended the jurisdiction of the federal courts to include *all* suits involving these institutions when it created the national charter in 1863. *See Act of Feb. 25, 1863*, 12 Stat. 665, 681. "For the first couple [of] decades of their existence, any suit involving a national bank could be brought in or removed to federal court since national banks are creatures of federal law and thus any suit by or against them was a suit arising under federal law." *Firstar Bank*, 253 F.3d at 986, citing *Petri v. Commercial Nat'l Bank of Chicago*, 142 U.S. 644, 648 (1892); *Horton*, 387 F.3d at 430 (same).

In 1882, Congress eliminated automatic federal question jurisdiction over all disputes involving national banks. *See Leather Mfrs.' Nat'l Bank v. Cooper*, 120 U.S. 778, 780-81 (1887). In doing so, however, it acknowledged the general principal that national banks should not be put at a disadvantage with respect to state banks in terms of access to the federal courts. Congress expressly provided that jurisdiction over lawsuits involving national banks "shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States...." *Act of July 12, 1882*, 22 Stat. 162, 163. The Court promptly construed this 1882 amendment to place "national banks on the same footing as the banks of the state where they were located

for all the purposes of the jurisdiction of the courts of the United States." *Leather Mfrs.' Nat'l Bank*, 120 U.S. at 780; *see also Petri*, 142 U.S. at 649 (observing that 1882 amendment "placed [national banks] in the same category with banks not organized under the laws of the United States"); *Firstar Bank*, 253 F.3d at 986; *Horton*, 387 F.3d at 430.

In 1887, Congress again revised the jurisdictional statute, introducing the language at issue in this case. *See Act of Mar. 3, 1887,* 24 Stat. 552, 554 (providing that "all national banking associations ... shall ... be deemed citizens of the States in which they are respectively located"). When interpreting this statutory revision, this Court again recognized the clear intent of Congress that national banks be accorded equal access to the federal courts. *See Petri*, 142 U.S. at 650-51 ("No reason is perceived why it should be held that congress intended that national banks should not resort to federal tribunals as other corporations and individual citizens might."); *Horton*, 387 F.3d at 432-33; *Fin. Software Sys., Inc. v. First Union Nat'l Bank*, 84 F. Supp. 2d 594, 600 (E.D. Pa. 1999) (recognizing that the 1887 Act changed the structure of the 1882 enactment, but it "did not change the purpose"). Indeed, the 1887 Act expressly stated that Congress intended to put national banks on at least as good a footing as individuals and state-chartered institutions with respect to access to federal courts: "[I]n such cases [involving national banks,] the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State." *Act of Mar. 3, 1887*, 24 Stat. 552, 554-55.

In 1911, Congress dropped the language just quoted and adopted language nearly identical to the current section 1348: "[A]ll national banking associations established

under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located." *Act of Mar. 3, 1911*, 36 Stat. 1087, 1092-93. Given the fact that virtually all national banks – like state banks – had offices in only a single state, which meant that national banks were "located" only where they had their main office.

However, there *were* a few exceptions to this general rule, and one of those exceptions, the Bank of California, had branches in Oregon in addition to its main office in California. In a diversity action brought against the bank in Oregon, the United States Court of Appeals for the Ninth Circuit affirmed the district court's conclusion that:

> [a] logical interpretation of the phraseology of [the 1911 Act language] leads to the conclusion that the 'States in which they (national banking associations) are respectively located' are those states in which their principal places of business are maintained. If the Congress had intended to provide that a national banking institution be given the privilege and should carry the duties of citizenship in various states upon the basis of branch business offices being established therein, it would be a noteworthy departure from the general rule, and more likely than not Congress would have plainly state[d] such intent.

American Surety Co. v. Bank of California, 133 F.2d 160, 162 (9th Cir. 1943). Congress subsequently responded to this authoritative judicial construction of the "located"

language – and judicial prompting for a "plain statement" from Congress if the rule was intended to be otherwise – when it re-codified the statute five years later, in 1948.

The 1948 re-codification resulted in the current statute, 28 U.S.C. § 1348. Significantly, the 1948 re-codification resulted in no substantive change to the statute. Congress chose to leave intact the provision of the statute relied upon by the Ninth Circuit in *American Surety* when it deemed national banks to be "citizens of the States in which they are respectively located" – *i.e.*, the state of their principal place of business. And when Congress amended the *National Bank Act* in 1994 to take up the issue of interstate branching for national banks in *Riegle-Neal,* it once again left in place the statutory language of section 1348.

SUMMARY OF THE ARGUMENT

The Court should overturn the lower court's decision and reject its interpretation of 28 U.S.C. § 1348 because it is inconsistent with over 100 years of congressional and judicial construction of that provision and its historical predecessors. When Congress recodified the statute in 1948, it did so against the backdrop of settled historical interpretation of the statute which had (at the time) been recently confirmed by the United States Court of Appeals for the Ninth Circuit in the *American Surety*. The operative understanding recodified by Congress in 1948 was that the statute and its predecessors were intended to place national banks in the *same* position regarding federal jurisdiction as all other corporations. *Petri*, 142 U.S. at 650-51; *Leather Mfrs.' National Bank*, 120 U.S. at 780.

The fact that the lower court's decision will have a negative adverse impact upon the ability of national banks to litigate or remove cases to federal court is easily

demonstrated. If one were to compare Wachovia Bank's current level of access to federal district court under the lower court's restrictive construction of the statute versus its access if it were a state-chartered institution, the disparity become apparent: as a national bank, Wachovia Bank could establish federal diversity jurisdiction in only 35 of the 51 potential domestic jurisdictions. By contrast, if Wachovia Bank were a state-chartered institution, it could establish federal diversity with respect to citizens located in 49 or 50 of the 51 potential domestic jurisdictions.

Finally, the Court should also conclude that the lower court's decision, if upheld, will likely have a significant impact upon cases already pending within the federal courts, at both the trial and appellate levels. As discussed below, the ABA is aware of a number of cases involving national banks that have been dismissed or remanded as a result of the ruling in this case. If the Fourth Circuit's rule interpretation of 28 U.S.C. § 1348 were adopted by the Court as correct, it will force the remand or dismissal of scores of existing cases, many fully briefed and ripe for decision, where the parties have invested years of time and treasure litigating in a federal forum.

ARGUMENT

A. The Court Should Interpret The Statute Consistent With The Settled Congressional And Judicial Construction.

As the short historical recitation demonstrates, section 1348 is a statute that exists against a backdrop of over 100 years of settled congressional and judicial construction. A statute's longstanding meaning forms the

background against which Congress legislates when it amends the law. Courts presume that Congress will use clear language if it intends to alter an established understanding about what a law means; if Congress fails to do so, courts presume that the new statute has the same effect as the older version. *Firstar Bank*, 253 F.3d at 988, *citing Cottage Savings Association v. Commissioner*, 499 U.S. 554, 562 (1991). Moreover, if a phrase or section of a law is clarified through judicial construction, and the law is amended, but retains that same phrase or section, then Congress presumably intended for the language in the new law to have the same meaning as the old. *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *Firstar Bank*, 253 F.3d at 988.

Applying these interpretive principles here, the Court should conclude two things. First, when Congress re-codified section 1348 in 1948 it did so in a context where the interpretation of the statute was in fact settled – an interpretation had (at the time) been recently confirmed by the United States Court of Appeals in the *American Surety*. The understanding adopted by Congress in 1948 was this: the 1882 amendments to the *National Bank Act*, as carried over in the 1887 and 1911 Acts, placed national banks in the *same* position regarding federal jurisdiction as all other corporations. *Petri*, 142 U.S. at 650-51; *Leather Mfrs.' National Bank*, 120 U.S. at 780. *See Mercantile National Bank v. Langdeau*, 371 U.S. 555, 565-66 (1963) ("Section 4 [of the 1882 and 1887 amendments] apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited."). Second, the Court should conclude that when Congress once again declined to amend the language of 28 U.S.C. § 1348 when it loosened the restrictions on interstate branching for national banks in 1994 with the enactment of

Riegle-Neal, its intention was to once again preserve the longstanding parity between state and national banks with respect to access to federal courts.

B. The Lower Court's Interpretation Does Not Put National Banks On An Equal Footing With State Chartered Institutions.

The Court should reject the lower court's interpretation of 28 U.S.C. § 1348 for the fundamental reason that it fails to carry out the intention of Congress. That is, it utterly fails to preserve the parity between national banks and state-chartered institutions with regard to access to federal courts that Congress has sought to foster and protect for over 100 years.

This point is easily demonstrated by comparing the petitioner's, Wachovia Bank's, current level of access to federal district court under the lower court's restrictive construction of the statute versus its access if it were a state-chartered institution. Under the lower court's interpretation of 28 U.S.C. § 1348, Wachovia Bank would be deemed to be a "citizen" of the state where its main office is located and where it has established a branch. Wachovia Bank, N.A., currently has 3,331 branches or offices located in 16 different states (including the District of Columbia). (See Appendix A). Thus, under the lower court's decision, Wachovia Bank could establish federal diversity jurisdiction under 28 U.S.C. § 1332 in only 35 of the 51 potential domestic jurisdictions.

By contrast, if Wachovia Bank were a state-chartered institution, it would fare much better under the lower court's ruling. Diversity jurisdiction would be governed by 28 U.S.C. § 1332(c)(1). For the purposes of establishing the citizenship of a corporation, section

1332(c)(1) provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the state where it has its principal place of business... ." Thus, if one were to change Wachovia's status from a national bank to a state chartered institution, it could establish federal diversity jurisdiction with respect to citizens located in 49 or 50 of the 51 potential domestic jurisdictions. As recognized by the Fifth Circuit in *Horton*, this easily-demonstrated disparity "would lead to a narrow concept of 'parity'" between national and state charters with respect to access to federal courts. 387 F.3d at 433.

C. The Lower Court's Decision Would Likely Have A Significant Impact Upon Pending Litigation Within The Federal System.

The Court may also conclude that the lower court's decision, if upheld, will likely have a significant impact upon cases already pending within the federal courts, at both the trial and appellate levels. As discussed below, the ABA is aware of a number of cases involving national banks being dismissed or remanded as a result of the Fourth Circuit's construction of 28 U.S.C. § 1348. If the Fourth Circuit's rule were adopted by the Court as correct, one may reasonably expect that a significant numbers of cases – some pending for years – will either be dismissed or remanded to state forums for lack of federal jurisdiction.

Unfortunately, there appear to be no readily-available statistics regarding the number of diversity cases currently pending within the federal system that involve national banks. What is known, however, is that national banks do frequently appear as litigants in federal court. A

search of the U.S. Party/Case Index available on PACER[13] gives some indication of the number of cases under discussion. For example, a search of the term "Wachovia Bank" reveals that between January 1 and August 1, 2005, "Wachovia Bank" appeared as a party in 100 new civil cases and 11 new appeals that were filed during that period with the various United States District Courts and federal Courts of Appeal. A broader search discloses that since January 1, 2000, "Wachovia Bank" has appeared as a party in 105 discrete appellate matters and 575 civil matters pending in District Court.

While Wachovia Bank is a large institution, given the fact that there are presently over 1,900 national banks of all sizes within the United States, the Court may readily grasp the total numbers of cases within the federal court system that involve national banks – including cases based on federal diversity jurisdiction – that may be affected by a ruling in this case. Indeed, the history of this particular case[14] and the reaction to the lower court's decision within

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[13] The U.S. Party/Case Index is a national locator index for PACER systems that tracks activity in the United States appellate, district and bankruptcy courts. The information that is provided includes the party name, the court where the case is filed, the case number and the filing date.

[14] It is worth noting that the present matter was originally filed with the United States District Court for the District of South Carolina in June of 2003, and that the jurisdictional issue presently before the Court was raised for the first time on appeal. *Schmidt*, 388 F.3d at 415. Similarly, the docket for *National Union Fire v. Allfirst Bank, et al.*, Case No. 03-2276 (4th Cir., January 28, 2005), reflects that First Union National Bank was dismissed from the case as a "dispensable non-diverse party" on the eve of oral argument. The case

the Fourth Circuit amply demonstrate this latter point. Since the Fourth Circuit issued its decision in November of 2004, the ABA has become aware of a number of additional cases that have either been dismissed or remanded to state court in conformance with the lower court's ruling. *See Coots v. Wachovia Bank, N.A.*, 114 Fed.Appx. 586, 2004 U.S. App. LEXIS 25554 (4th Cir. 2004) (judgment of district court vacated and case remanded for a determination of whether there is diversity jurisdiction in light of the rule enunciated in *Wachovia v. Schmidt*); *National Union Fire v. Allfirst Bank, et al.*, Case No. 03-2276 (4th Cir., January 28, 2005)(Order dismissing First Union National Bank as a "dispensable non-diverse party" in order to preserve diversity jurisdiction in light of ruling in *Wachovia v. Schmidt*); *Halifax Corp. v. Wachovia Bank, N.A.*, 2005 WL 1799507 (E.D. Va., July 21, 2005)(dismissal granted, citing *Wachovia v. Schmidt*); *Wachovia Bank, N.A. v. Ranson*, 2005 WL 555587 (W.D.Va., Feb 28, 2005) (same); *Friel Prosthetics, Inc. v. Bank of America*, 2005 WL 348263 (D. Md., Feb 09, 2005)(removal from state court deemed improper because of lack of diversity jurisdiction, citing *Wachovia v. Schmidt*, and matter remanded back to state court).

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was originally filed in the United States District Court for the District of Maryland May, 2002. The appeal was docketed at the United State Court of Appeals for the Fourth Circuit in October, 2003. The parties were ordered *sua sponte* in January of 2005 to submit supplemental briefs on the impact of the Fourth Circuit's ruling in *Schmidt*. First Union National Bank was dismissed from the case by order dated January 28, 2005.

In sum, the ABA respectfully submits that an adverse ruling in this case will not only artificially limit the filing or removal of *new* matters involving national banks in federal court, it will also potentially force the remand or dismissal of scores of existing cases, many fully briefed and ripe for decision, where the parties have invested years of time and treasure litigating in a federal forum.

CONCLUSION

For the foregoing reasons, as well as for those set forth in the brief of Petitioner, the Court should reverse the decision.

Respectfully submitted,

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Appendix A

Number of Branches/Offices Operated by the Ten Largest National Banks (as Determined by Asset Size)

Institution	Number of Domestic Branches/Offices	Number of States (Inc. District of Columbia)
JPMorgan Chase Bank, NA	2,575	18
Bank of America, NA	5,958	30
Citibank, NA	287	1
Wachovia Bank, NA	3,331	16
Wells Fargo Bank, NA	3,149	24
U.S. Bank, NA	2,492	25
HSBC Bank USA, NA	429	9
Chase Bank USA, NA	3	1
Keybank, NA	961	13
PNC Bank, NA	846	10

Source: Federal Deposit Insurance Corporation (FDIC), *Institution Directory* (as of August 12, 2005), http://www2.fdic.gov/idasp/main.asp.

(6)

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No. 04-1186

In the Supreme Court of the United States

WACHOVIA BANK, NATIONAL ASSOCIATION,

Petitioner,

v.

DANIEL G. SCHMIDT III, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

28 U.S.C. § 1348 provides that, with limited exceptions that are inapplicable here, "[a]ll national banking associations shall * * * be deemed citizens of the States in which they are respectively located."

The question presented is whether, for purposes of federal diversity jurisdiction, a national banking association is "located" in, and thus deemed to be a citizen of, every state in which it maintains a branch.

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING

Pursuant to this Court's Rule 29.6, petitioner states that its parent company is Wachovia of Alabama, Inc. The parent company of Wachovia of Alabama, Inc. is Wachovia Corporation, a publicly held corporation. Wachovia Corporation indirectly holds 100% of petitioner's equity.

The parties to the proceeding in the court of appeals were Wachovia Bank, National Association; Daniel G. Schmidt, III; Priag LLC; and DGS Investments, Inc.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 388 F.3d 414. The order of the court of appeals denying rehearing and rehearing en banc, and the accompanying dissent (Pet. App. 57a-62a), are unreported. The opinion of the district court (Pet. App. 47a-56a) is unreported.

JURISDICTION

The court of appeals' judgment was entered on November 1, 2004. A timely petition for rehearing was denied on January 28, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1332(a) of the Judicial Code (28 U.S.C. § 1332(a) (1993 & Supp. 2004)) provides, in pertinent part:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States * * * .

Section 1348 of the Judicial Code (28 U.S.C. § 1348 (1993 & Supp. 2004)) provides, in pertinent part:

> The district courts shall have original jurisdiction of any civil action commenced by the United States * * * against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

All national banking associations shall, for the purpose of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

STATEMENT

This case concerns the meaning of 28 U.S.C. § 1348, which provides that, for purposes of diversity jurisdiction, national banks are treated as citizens "of the states in which they are respectively located." At the time that Section 1348 and its predecessor statutes were enacted, all corporations, including state-chartered banks, were regarded as citizens of only a *single* state for diversity purposes. Here, however, the Fourth Circuit held that Section 1348 treats national banks as "located" in, and therefore as citizens of, *all* states in which they operate branches. Under its analysis, national banks may be citizens of multiple states across the country, and therefore have an access to the diversity jurisdiction of the federal courts that is uniquely *limited* as compared to their state-chartered competitors and other corporations. This holding is not dictated by the statutory language, was not intended by Congress, and is wholly illogical. It should be set aside.

1. Petitioner Wachovia Bank, National Association ("Wachovia") is a national banking association chartered by the Comptroller of the Currency under Title 12 of the United States Code, with its main office and principal place of business in Charlotte, North Carolina. Pet. App. 2a.[1] Wachovia maintains interstate branch locations in 15 States (including

[1] Although the term "main office" is used in several banking statutes (*e.g.*, 12 U.S.C. § 30(b)), it has no statutory definition. The Comptroller understands the term to refer to "the 'place where [the bank's] operations of discount and deposit are to be carried on'" and treats that place as "the location of the bank for corporate status purposes." OCC Inter. Ltr. 952 (Oct. 23, 2002), 2003 WL 23221430, at *1-2.

South Carolina) and the District of Columbia. See FDIC Institution Directory, http://www2.fdic.gov/idasp/main.asp (last visited Aug. 15, 2005).[2]

Wachovia commenced this action in the United States District Court for the District of South Carolina, seeking to compel the arbitration of claims that had been asserted against it by respondents, who are citizens of South Carolina. Pet. App. 2a. Wachovia invoked the district court's diversity jurisdiction pursuant to 28 U.S.C. § 1332. The court assumed jurisdiction over the action but dismissed Wachovia's petition on the merits, ruling that respondents were under no obligation to arbitrate their claims. Pet. App. 47a-56a. Wachovia timely appealed that ruling to the United States Court of Appeals for the Fourth Circuit.

Just before oral argument, respondents for the first time raised the contention that the action should be dismissed for lack of diversity jurisdiction. Respondents pointed to Section 1348, which provides that, for purposes of all actions other than certain specified ones not involved here, "national banking associations shall * * * be deemed citizens of the States in which they are respectively located." Under Section 1348, respondents argued, Wachovia is "located" in *every* state in which it maintains a branch, including South Carolina. Therefore, respondents asserted, the district court lacked diversity jurisdiction over Wachovia's petition to compel arbitration. After oral argument, the Fourth Circuit directed the parties to file supplemental briefs of not more than five pages on the jurisdictional issue.

[2] A bank branch is defined as a place "at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(j). Bank offices that do not perform any of these functions are not "branches" within the meaning of federal law. See *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 404-409 (1987).

2. A divided panel of the Fourth Circuit agreed with respondents, holding that Wachovia should be considered a citizen of every state in which it maintains a branch and that Wachovia's suit accordingly should be dismissed for want of jurisdiction. Pet. App. 1a-46a. The majority began by stating that "the ordinary meaning of 'located' suggests that a national bank is 'located' wherever it has a physical presence." *Id.* at 4a. The court sought to bolster this conclusion by noting that "Section 1348 uses two distinct terms to refer to the presence of a banking association: 'established' and 'located.'" *Id.* at 8a. These terms could be given "distinct meanings," the court believed, by reading "'established' to refer to a bank's charter location" and "'located' to refer to the place or places where it has a physical presence." *Ibid.* The majority relied heavily on *Citizens & Southern National Bank* v. *Bougas*, 434 U.S. 35 (1977), which held that the word "located," in a prior version of a national bank venue statute, "referred to branch locations." Pet. App. 13a.

The Fourth Circuit majority acknowledged that its holding conflicted with decisions of the Fifth, Seventh, and Ninth Circuits. It nevertheless dismissed these contrary rulings: "That our sister circuits may disagree with us in any given case is significant only insofar as their reasoning is persuasive. Here, that reasoning is simply unconvincing." Pet. App. 30a-31a. Pointing to what it described as "the evident weakness and transparent flaws in the Fifth and Seventh Circuit opinions" – respectively written for those courts by Judges Higginbotham and Flaum – the Fourth Circuit faulted their holdings as "amount[ing] to little more than judicial assertion of a policy preference in favor of federal forums for national banking associations." *Id.* at 32a.

Judge King dissented. Pet. App. 33a-46a. He first opined that the word "located" is ambiguous as a matter of ordinary usage. *Id.* at 35a. Turning to the statutory purpose, he concluded that "[t]he relevant history of our national banks reveals that Congress intended for such banks to enjoy

the same access to federal courts as that accorded other banks and corporations" (*id.* at 36a) – which, at the time of enactment of Section 1348, were deemed to be citizens of only a single state. Unlike the majority, Judge King believed that *Bougas* sheds little light on the question here because the venue provision there at issue differed in its purpose and origins from Section 1348. *Id.* at 41a-44a. He also ascribed little significance to the statute's use of the terms "established" and "located"; at the time of enactment of Section 1348, he explained, those terms "would have been functionally equivalent for jurisdictional purposes because a national bank was both 'established' and 'located' in the place specified in its certificate of organization." *Id.* at 45a (citation and internal quotation marks omitted).

Six judges voted to grant Wachovia's subsequent petition for rehearing en banc and only three voted to deny it. Four judges recused themselves, however, so the petition failed to garner the votes of a majority of the Fourth Circuit's 13 active judges and accordingly was denied. Pet. App. 57a-58a. Dissenting from the denial of rehearing, Judge King again emphasized that Congress has "consistently intended to provide national banks with the same access to the federal courts as that accorded corporations and state banks," adding that "the Supreme Court has recognized and enforced congressional intent on this point." *Id.* at 60a-61a.

INTRODUCTION AND SUMMARY OF ARGUMENT

At the time that Section 1348 and its predecessors were enacted, corporations (including state-chartered banks) were treated as citizens of only a *single* state for diversity purposes; even today, a corporation is deemed to be a citizen of no more than two states, the one in which it is incorporated and (if different) the one in which it maintains its principal place of business. As a consequence, the Fourth Circuit's holding that national banks are citizens of *all* states in which they operate branches imposes unique and extraordinary re-

strictions on the access of those entities to the diversity jurisdiction of the federal courts.

This is an outcome that no Congress that legislated on the subject could have or affirmatively did intend. To the contrary, from the creation of the national bank system in 1863, federal policy has dictated that national banks not be disadvantaged vis-à-vis their state-chartered counterparts. Against this background, the Fourth Circuit's counter-intuitive reading of Section 1348, which posits that Congress subjected national banks to different and less favorable rules than those that govern state-chartered banks and all other corporations, should be upheld only if it is compelled by unambiguous statutory language or the clearest expression of congressional intent – neither of which is present here.

A. The Fourth Circuit relied in substantial part on its belief that the word "located" as used in Section 1348 refers unambiguously to *all* places in which national banks maintain a physical presence. But that simply is not so. This Court has itself observed that "[t]here is no enduring rigidity about the word 'located'" as used in banking statutes. *Bougas*, 434 U.S. at 44. Common usage of the word confirms that it has no fixed meaning (*e.g.*, it is not at all obvious where Ford Motor Company is "located"); so does Congress's use of the word in some banking statutes to refer unequivocally to the single place where a national bank has its principal office, and in others to any place where the bank maintains a branch. And Section 1348's use of the word hardly can unambiguously mean what the Fourth Circuit said it does, when the two-judge majority's understanding of "located" has been rejected by the third member of the panel, three other courts of appeals, almost a dozen district courts, and the Comptrolier of the Currency.

B. Because the language of the statute is ambiguous, the Court must turn to other interpretive guides to determine the meaning of "located." When that is done, the ambiguity is

dispelled: the statutory evolution and history make clear that Congress intended to establish jurisdictional *parity* between national and state banks. The original predecessor to Section 1348, enacted in 1882, set out that parity rule expressly, providing that federal jurisdiction over national banks "shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States." Act of July 12, 1882, 22 Stat. 162, 163. This Court consistently has held that each subsequent iteration of the statute – including the 1887 Act that first used the "located" language and the 1911 codification that put the law in essentially its current form – was not intended to effect any substantive change. And under the parity rule, the Fourth Circuit's holding is insupportable because, at the time of the enactment of Section 1348 and each of its predecessors, state banks and other corporations were understood to be citizens of only a *single* state.

This conclusion is confirmed by repeated congressional re-enactment of the "located" language *after* it had been interpreted by the courts to mandate equivalent treatment for national and state banks. This Court several times read that language to express the parity principle first enunciated in the 1882 Act; after each decision, Congress responded by using identical language in subsequent versions of the statute. Similarly, in 1943 a federal court of appeals read Section 1348's immediate predecessor to provide that national banks are not located wherever they operate branches; Congress re-enacted Section 1348 five years later without change.

The Fourth Circuit's contrary conclusion was predicated on its belief that Congress had modified the law prior to 1948 to permit interstate branching by national banks. Starting with that premise, the court reasoned that re-enactment of the term "located" in 1948 must have contemplated interstate branch locations. But here, the court of appeals simply committed an historical error. Although Congress acted in 1927 and 1933 to permit limited *intra*state branching by national

banks, the general prohibition on *inter*state branching by such banks remained in force until 1994. Intrastate banking, of course, has no implications for diversity jurisdiction. The Fourth Circuit thus labored under a crucial misimpression; because there had been no relevant change in the law governing interstate branching prior to 1948, Congress's re-enactment of the "located" language in that year *confirms*, rather than departs from, the previous view that national banks are located in only a single state for diversity purposes.

Other considerations point in the same direction. The Comptroller, whose views on the meaning of Section 1348's ambiguous language are entitled to deference, has concluded that national banks are not "located" wherever they operate branches. And the Fourth Circuit's holding departs from the settled congressional policy – dating to enactment of the first national banking statute in 1863 – of not disfavoring national banks vis-à-vis their state counterparts.

C. The Fourth Circuit also erred in reasoning that the words "established" and "located" as used in Section 1348 must be given different meanings. The history of interstate branch banking belies this analysis. Because national banks as a general rule could maintain banking offices in only a single state at the time of the enactment of Section 1348 and its predecessors, the words were functionally identical for jurisdictional purposes when they were placed in the statute. Moreover, the words were not chosen at the same time by the same Congress. Instead, the "located" clause of Section 1348 was drafted in 1887, while the "established" clause originated in a different statute in 1875. The two clauses were combined with the codification of Section 1348's predecessor in 1911. Because Section 1348 thus was formed from pre-existing bits, there is every reason to believe that Congress did not give any thought to, or see any significance in, the use of different words in the provision's two sentences (especially because, at the time, no consequences could have followed from use of different words).

D. The majority below also erred in relying on this Court's decision in *Bougas* construing the word "located" in a former national bank venue statute. *Bougas* expressly eschewed reliance on the "plain meaning" of "located." Instead, the Court focused on the policies of the venue statute, which are concerned with the convenience of the parties, concluding that national banks would not be unduly burdened by litigating where they maintain branches. Section 1348, in contrast, is a diversity statute that is aimed at the possibility of local prejudice against an out-of-state entity – a concern that applies to national banks every bit as much as it does to other corporations conducting a national business.

E. Concluding that national banks are not "located" everywhere they operate branches leaves open one question: what *is* a national bank's location for purposes of Section 1348? Decision of that question is not necessary for the resolution of this case because Wachovia cannot be deemed a citizen of South Carolina under any plausible test. But having said that, it is Wachovia's position that Congress intended national banks to be citizens of only a single state for diversity purposes. That state is the one identified in the bank's organization certificate, as modified by any designation submitted to the Comptroller that moves the institution's main office to a new state. This reading of the statute, which comports with Congress's stated goal of jurisdictional parity and rests on a close analogy to the citizenship rules applicable to other corporate entities at the time of Section 1348's enactment, focuses on the state where Congress would have regarded a national bank as being "located."

ARGUMENT

The Fourth Circuit held that Congress intended to depart from the ordinary rules defining the place of corporate citizenship – and to substantially diminish the availability of diversity jurisdiction for national banks – when it provided in Section 1348 that a national bank should be deemed a citizen

of the state where it is "located." Surely, a court should not reach such a counter-intuitive result unless compelled to do so by clear statutory language or manifest congressional intent. But here, the controlling statutory language is ambiguous, while the legislative history shows that Congress intended to establish jurisdictional *parity* between national and state-chartered banks. Thus, as this Court remarked in similar circumstances last Term, "[t]he text does not dictate th[e Fourth Circuit's] result; the statutory history suggests otherwise; and there is scant indication Congress meant to change the well-established meaning" (*Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 125 S. Ct. 460, 468 (2004)) of a prior statutory provision that expressly required equivalent jurisdictional treatment for national and state banks. Consequently, the court of appeals' decision should be reversed.

A. The Term "Located" In Section 1348 Is Ambiguous

In holding national banks to be citizens of all states in which they operate branches, the Fourth Circuit first concluded that the word "located" is wholly unambiguous, a point to which it returned throughout its opinion. Pet. App. 4a-7a, 11a, 19a, 31a. Looking largely to dictionary definitions, the court reasoned that, "[i]n ordinary parlance, the word 'located' is a general term referring to physical presence in a place." *Id.* at 4a. From this starting point, the court determined that "the ordinary meaning of 'located' * * * naturally includes branch offices." *Id.* at 5a.

This Court, however, has understood matters differently, observing that "[t]here is no enduring rigidity about the word 'located'" and finding that recourse to the legislative purpose therefore is necessary to make sense of a statute using the term. *Bougas*, 434 U.S. at 44 (interpreting "located" in a national bank venue statute). And as other courts have pointed out in the specific context of Section 1348, the obvious problem with tying "located" to the concept of "physical presence

in a place" is that it begs the fundamental question that determines the outcome here: physical presence *of what*?[3] The point is made clear by looking to common usage of the word. Consider, for example, the following question: "where is the Ford Motor Company located?" We suspect that most people who are asked that question would either simply say "Michigan" or would, at a minimum, seek clarification: did the questioner want to know the location of Ford's headquarters, or did the query refer to all the places around the world where Ford has facilities?[4] But the word "located," viewed in isolation, does not make clear precisely what information is sought.

In fact, the ambiguity of "located" as used in this setting would seem beyond reasonable dispute. It is surprising that the Fourth Circuit ruled otherwise here, since the court itself acknowledged that the word is sufficiently adaptable that, in many provisions of the National Bank Act, Congress used "location" "in a specialized sense to refer only to charter location." Pet. App. 19a-20a. Thus, the word is used in some banking statutes to refer unequivocally to the place where a national banking association has its principal office. *E.g.*, 12

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[3] A number of dictionary definitions of "locate" are collected by the Fourth Circuit (see Pet. App. 4a) and by the Seventh Circuit in *Firstar Bank N.A.* v. *Faul*, 253 F.3d 982, 987 (7th Cir. 2001). But as the Seventh Circuit explained after reviewing these entries, "[u]nfortunately, such definitions do not provide much aid in our inquiry – what we are trying to determine is the number or scope of places where a national bank is fixed or established." *Ibid.*

[4] As Judge Flaum wrote for the Seventh Circuit in *Firstar*, "if in the course of discussing jurisdictional motions a federal judge asks a lawyer representing a corporation 'where is your client located?,' the judge likely expects to hear the lawyer respond by naming the state containing the corporation's principal place of business and probably the state of incorporation as well. The judge does not expect for the lawyer to rattle off every state where the corporation has facilities or a presence." 253 F.3d at 987.

U.S.C. § 32 (liabilities of association "under its old name or at its old location" not affected), § 52 (stock certificates must bear "the name and location of the association"), § 75 (shareholders' meetings shall be postponed until the first banking day following "a legal holiday in the State in which the bank is located"). In other national bank statutes, by contrast, the word refers to any place where a national bank maintains a branch office. *E.g.*, 12 U.S.C. § 92 (allowing a national bank "located and doing business in any place the population of which does not exceed five thousand inhabitants" to sell insurance). Because the word is capable of more than one plausible interpretation, then, it is ambiguous, and its meaning in Section 1348 cannot be divined by resort to a "plain meaning" analysis.

Other judicial interpretations of Section 1348 confirm the point. Three courts of appeals, the dissenting judge below, almost a dozen federal district courts,[5] and the Comptroller of the Currency (see OCC Inter. Ltr. 952 (Oct. 23, 2002), 2003 WL23221430) have all concluded that "located" as used in Section 1348 is ambiguous and does *not* refer to branches;

[5] See *RDC Funding Corp.* v. *Wachovia Bank, N.A.*, 2004 WL 717111 (D. Conn. Mar. 31, 2004) (unpublished opinion); *Adams* v. *Bank of Am., N.A.*, 317 F. Supp. 2d 935, 941-942 (S.D. Iowa 2004); *MBIA Ins. Corp.* v. *Royal Indem. Co.*, 294 F. Supp. 2d 606 (D. Del. 2003); *Carl* v. *Republic Sec. Bank*, 282 F. Supp. 2d 1358, 1364 n.1 (S.D. Fla.), appeal dismissed, 2003 WL 22172202 (11th Cir. Aug. 5, 2003); *Evergreen Forest Prods. of Ga., LLC* v. *Bank of Am., N.A.*, 262 F. Supp. 2d 1297, 1307 (M.D. Ala. 2003); *Bank One, N.A.* v. *Shreeji A&M, Inc.*, 2003 U.S. Dist. LEXIS 10994 (N.D. Tex. June 27, 2003); *Pitts* v. *First Union Nat'l Bank*, 217 F. Supp. 2d 629, 630-631 (D. Md. 2002); *Bank One, N.A.* v. *Euro-Alamo Invs., Inc.*, 211 F. Supp. 2d 808, 810 (N.D. Tex. 2002); *Bank of Am., N.A.* v. *Johnson*, 186 F. Supp. 2d 1182, 1183 (W.D. Okla. 2001); *Fin. Software Sys.* v. *First Union Nat'l Bank*, 84 F. Supp. 2d 594, 601 (E.D. Pa. 1999).

the majority below concluded that it *does*.[6] In similar circumstances, and faced with a similar disagreement (although one involving a far *less* developed conflict in the lower courts), this Court observed that "it would be difficult indeed to contend that the word 'interest' in the National Bank Act is unambiguous with regard to the point at issue here." *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996). Precisely the same conclusion applies in this case. Analysis of Section 1348 must therefore "proceed on the premise that the text [of the statute] is not altogether clear." *Koons*, 125 S. Ct. at 470-471 (Kennedy, J., concurring).

B. The Background And Evolution Of Section 1348 Indicate That National Banks Are Not "Located" Wherever They Operate Branches

Because Section 1348 is ambiguous, the Court must turn to other interpretive aids to determine the meaning of "located." Simply as a logical matter, the absence of any evi-

[6] Some district courts have held that national banks are "located" within the meaning of Section 1348 in states where they operate branches, but even these courts did not suggest that the word "located" as used in the statute is unambiguous. See *Frontier Ins. Co.* v. *MTN Owner Trust*, 111 F. Supp. 2d 376, 379-380 (S.D.N.Y. 2000); *Ferraiolo Constr., Inc.* v. *Keybank, N.A.*, 978 F. Supp. 23 (D. Me. 1997); *Norwest Bank Minn., N.A.* v. *Patton*, 924 F. Supp. 114, 115 (D. Colo. 1996); *Bank of New York* v. *Bank of Am.*, 861 F. Supp. 225, 231 (S.D.N.Y. 1994); *Connecticut Nat'l Bank* v. *Iacono*, 785 F. Supp. 30 (D.R.I. 1992). The Second Circuit considered the meaning of Section 1348 in two cases, but has not squarely decided the meaning of "located." See *United Republic Ins. Co.* v. *Chase Manhattan Bank*, 315 F.3d 168, 169 (2d Cir. 2003) (remanding case to district court to determine whether diversity jurisdiction existed under 28 U.S.C. § 1348); *World Trade Ctr. Props., L.L.C.* v. *Hartford Fire Ins. Co.*, 345 F.3d 154, 161 (2d Cir. 2003) (suggesting, in *dictum*, that a national bank is deemed by 28 U.S.C. § 1348 "to be a citizen of every state in which it has offices").

dent reason why Congress would have wanted national banks to be governed by different rules from those applicable to state banks suggests that the Fourth Circuit's reading of the statute is an improbable one. And common sense is confirmed by the statutory and jurisprudential history of Section 1348. In fact, Congress enacted and re-enacted the language at issue here to establish jurisdictional *parity* between national banks and their state-chartered counterparts, which were considered citizens of a *single* state at all times from 1882 (when Congress first established jurisdictional parity) to 1887 (when the language now codified in Section 1348 was first enacted) to 1948 (when Congress enacted Section 1348 and last turned its attention to the question of diversity jurisdiction for national banks).[7] The Fourth Circuit's holding cannot be reconciled with this congressional intent – or with the numerous prior decisions of this Court construing Section 1348's predecessors.

1. The Statutory History Of Section 1348 Shows That Congress Intended To Establish Jurisdictional Parity Between National Banks And State-Chartered Corporations

a. Section 59 of the National Currency Act of 1863 provided that any suit by or against a national bank could be brought in federal court. See 12 Stat. 665, 681 (1863). The following year, Congress provided that most such suits also could be filed in state court. See National Bank Act of 1864, § 57, 13 Stat. 116-117.

In 1882, however, Congress eliminated general federal question jurisdiction for suits involving national banks; at the same time, it preserved diversity jurisdiction in such suits, expressly requiring parity in the jurisdictional treatment of

[7] Many of the relevant statutory provisions discussed below are reprinted as an appendix to the Court's opinion in *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555, 567-572 (1963).

national and state banks. A proviso to Section 4 of the 1882 Act stated:

> [T]he jurisdiction for suits hereafter brought by or against any association established under any law providing for national-banking associations * * * shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business when such suits may be begun[.]

Act of July 12, 1882 (the "1882 Act"), 22 Stat. 162, 163. The legislative history of the 1882 Act confirms Congress's intention. The sponsor of the amendment that became the proviso to Section 4 explained unequivocally that "'the jurisdictional limits for and as to a national bank shall be the same as they would be in regard to a State bank actually doing or which might be doing business by its side; that they shall be one and the same.'" *Mercantile Nat'l Bank at Dallas* v. *Langdeau*, 371 U.S. 555, 566 n.22 (1963) (quoting 13 Cong. Rec. 4049 (1882) (remarks of Rep. Hammond)).

Not long after passage of the 1882 Act, this Court interpreted it as "evidently intended to put national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States." *Leather Mfrs. Nat'l Bank* v. *Cooper*, 120 U.S. 778, 780 (1887). The Court added that, under the 1882 Act, a federal court would have jurisdiction in suits involving national banks when "a similar suit could be entertained by the same court by or against a state bank in like situation with the national bank." *Id.* at 781. As the Fourth Circuit itself acknowledged, the 1882 Act thus "was couched in terms of jurisdictional parity between national banks and state banks." Pet. App. 24a.

In 1887, Congress amended the then-existing judiciary statutes to include for the first time the "located" formulation

that appears today in 28 U.S.C. § 1348. The new language provided:

> That all national banking associations * * * shall, for purposes of all actions by or against them, * * * *be deemed citizens of the States in which they are respectively located*; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

Act of March 3, 1887 (the "1887 Act"), 24 Stat. 552, 554-555, § 4 (emphasis added); see also 25 Stat. 433 (1888) (correcting the text of the 1887 Act but not changing the relevant language).

In its first encounter with the 1887 Act, this Court concluded that Congress intended *no* substantive change from the 1882 Act and did *not* establish any special diversity rules for national banks. In fact, the Court suggested that Congress could have accomplished its purpose by doing no more than eliminating general federal question jurisdiction for suits involving national banks, but that, "[o]ut of abundant caution, [the 1887 Act] provided that national banks, for purposes of actions by or against them, should be deemed citizens of the states in which they were respectively located." *Petri* v. *Commercial Nat'l Bank of Chicago*, 142 U.S. 644, 650 (1892). Referring to the statutory clause specifying that federal courts "shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State," the Court also noted that "[n]o reason is perceived why it should be held that congress intended that national banks should not resort to federal tribunals as other corporations and individual citizens might." *Id.* at 650-651.[8] To the contrary, the Court found it "to be clear

[8] This clause – "the circuit and district courts shall not have jurisdiction other than such as they would have in cases *between* individual citizens of the *same* State" – was inartfully phrased. Read literally, it would appear to *eliminate* diversity jurisdiction for national banks because diversity does not exist "between" citizens of the "same" state. As the Court explained shortly after enactment of the provision, however, Congress had no such intent. Although noting delicately that "[t]he use of the word 'between' is perhaps open to criticism," the Court found it "clear" that this clause was designed simply to indicate that national banks must rely on diversity rather than federal question jurisdiction when bringing cases involving state-law claims to federal court. *Petri*, 142 U.S. at 651. The Court thus understood Congress to have meant that a national bank should receive the same treatment for diversity purposes as applied in cases involving (rather than "between") an individual citizen of the state where the bank was based.

> that th[is] clause was intended to have, and must receive, *the same effect and operation* as that of the proviso"

in the 1882 Act, which established jurisdictional parity between national and state banks. *Id.* at 651 (emphasis added). The Court added that, so far as diversity jurisdiction in suits involving national banks was concerned, "no limitation in that regard was intended." *Id.*[9]

In 1911, Congress amended the 1887 Act, incorporating it into the Judicial Code using wording substantially similar to the language of Section 1348. The 1911 amendment provided that district courts would have jurisdiction

> [o]f all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any association

[9] In subsequent years, the Court reiterated its view that the 1887 Act was "similar in its terms" to the 1882 Act. See *Ex Parte Jones*, 164 U.S. 691, 693 (1897); *Federal Intermediate Credit Bank of Columbia, S.C.* v. *Mitchell*, 277 U.S. 213, 216 (1928) (national banks were by the acts of 1882 and 1887 "put on the same basis in respect of jurisdiction as if they had not been organized under an act of Congress"); see also *Herrmann* v. *Edwards*, 238 U.S. 107, 111-112 (1915).

established in the district for which the court is held, under the provisions of title "National Banks," Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. *And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them,* * * * *be deemed citizens of the States in which they are respectively located.*

Act of Mar. 3, 1911, Pub. L. 61-475, § 24, 36 Stat. 1087, 1092-1093, ch. 2 (1911) (the "1911 amendment") (emphasis added).

The 1911 amendment thus kept the "located" language of the 1887 Act intact, while eliminating the 1887 Act's confusing and inartfully drafted clause stating that "the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State." This Court concluded that the 1911 amendment was not intended to effect any substantive change in the law. As the Court explained, "while [the amendment] adopted a different form of expression, it was in substance a reenactment of the earlier provision [of the 1887 Act] in respect of such jurisdiction. The provisions of the [1911] Judicial Code are to be construed as continuations of existing statutes, and no change of intent is to be implied unless clearly made manifest." *Federal Intermediate Credit Bank at Columbia, S.C.* v. *Mitchell*, 277 U.S. 213, 216 (1928); see also *Herrmann* v. *Edwards*, 238 U.S. 107, 117-118 (1915) (explaining that the intent of the 1911 amendment was "obviously to make the purpose of the re-enacted statute clearer" and noting that change in the meaning of legislation "by the adoption of the [1911] Judicial Code" is "not to be indulged in without a clear manifestation of such purpose"); Act of Mar. 3, 1911, 36 Stat. 1087, 1167, ch. 13, § 294 ("The provisions of this Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof,

and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest.").

Finally, in 1948, Congress recodified the language now appearing in Section 1348 without substantive change.[10] Congress has made no further amendments to the statutory text. In 1963, this Court restated *Petri's* longstanding interpretation of Section 1348's statutory predecessor, remarking

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[10] Curiously, it was not until 1948 that Congress expressly repealed that portion of the 1882 Act that specified jurisdictional parity between state and national banks, even though that proviso had long been rendered duplicative by succeeding legislation. *See Langdeau*, 371 U.S. at 570-571 & App. n.1 (setting forth in detail the statutory history of the relevant enactments). The codifiers of the 1911 Judicial Code expressly repealed the 1887 and 1888 Acts (see 1911 Amendment, 36 Stat. 1087, 1168, ch. 231, § 297), which had amended the 1875 Judiciary Act and w[illegible], accordingly, placed in the section of the Revised Statues that described the jurisdiction of the federal courts. The codifiers apparently overlooked the 1882 jurisdictional provision, however, which had amended the National Bank Act and been placed in a different section of the Revised Statutes dealing with national banks. The language from the 1882 Act did not appear in the 1925 version of the United States Code, which was an "official restatement * * * of all United States statutes presumptively in effect, evidently because the Committee on Revision cited the entire 1882 Act as repealed." *Langdeau*, 371 U.S. at 570 n.1. No significance should be attributed to Congress' housekeeping repeal of the 1882 provision as part of the 1948 codification of Section 1348; that codification, in the absence of a clear expression by Congress in the Reviser's Notes, did not effect any substantive change to the pre-existing statutes. See *Goldstein* v. *Cox*, 396 U.S. 471, 477-78 (1970); *Aberdeen & Rockfish RR. Co.* v. *Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 309 n.12 (1975). No such intent is expressed in the Reviser's Notes to Section 1348.

that "Section 4 [of the 1882 Act] apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited." *Langdeau*, 371 U.S. at 565-566.

b. As this history of Section 1348 confirms, nothing in the language or evolution of the statute suggests that Congress ever intended national banks to be governed by uniquely unfavorable diversity rules. The Fourth Circuit itself recognized that the 1882 Act expressly created jurisdictional parity between national banks and their state-chartered counterparts. Pet. App. 24a. And this Court has consistently held that the subsequent re-enactments and modifications of that Act made *no* substantive change in the law. Thus, in *Petri,* the Court concluded that the 1887 Act "was intended to have, and must receive, the same effect and operation as that of the proviso" in the 1882 Act. 142 U.S. at 651. Likewise, in *Mitchell* and *Herrmann,* the Court confirmed that the 1911 codification of the 1887 Act "was in substance a reenactment of the earlier provision [of the 1887 Act] in respect of [diversity] jurisdiction." *Mitchell*, 277 U.S. at 216. Neither did the 1948 codification effect any substantive change. The lesson to be drawn from this history is clear: Congress has remained faithful – from 1882 to the present – to its intention to provide national banks the same access to the diversity jurisdiction of the federal courts as is enjoyed by state banks and other corporations.

This principle of jurisdictional parity compels the conclusion that national banks must be treated as citizens of only a single state. Both at the time the "located" language was first enacted in Section 1348's predecessor in 1887 and when the statute was placed in its current form in 1948, it was the settled rule that corporations were treated for purposes of diversity as citizens *only* of their state of incorporation. This Court announced the governing rule as early as 1844. See *Louisville C. & C.R. Co.* v. *Letson*, 43 U.S. (2 How.) 497

(1844). The theoretical underpinnings of this doctrine changed over the years, but the fundamental rule itself was squarely reaffirmed in 1854 (see *Marshall* v. *Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 329 (1854)) and was not challenged for the next hundred years. See generally *Carden* v. *Arkoma Assocs.*, 494 U.S. 185, 188 (1990); 15 J. Moore, *et al.*, MOORE'S FEDERAL PRACTICE § 102 App.05 (3d ed. 1995).[11] When referring to the state where a national bank is "located," Congress accordingly must have had in mind the single state that was most equivalent to a state-chartered corporation's state of incorporation.

The Comptroller of the Currency surely had it right, then, when arguing, in support of Wachovia's petition for rehearing before the Fourth Circuit, that the holding below "departs from over 100 years of congressional action regarding federal court jurisdiction for national banks and consistent Supreme Court interpretations." No. 03-2061 (4th Cir.), *Wachovia Bank, N.A.* v. *Schmidt*, Br. for the Office of the Comptroller of the Currency, at 5. See also OCC Inter. Ltr. 952 (Oct. 23, 2002), 2003 WL 23221430, at *4-5. This conclusion by the Comptroller, about the meaning of a statutory provision that effectuates national banking policy, is due deference by the Court.

c. The Fourth Circuit disregarded this Court's longstanding interpretation of Section 1348 and its predecessors because it misapprehended the statute's history.

First, while acknowledging that the 1882 Act provided for parity between national and state banks, the court of ap-

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[11] Congress modified this rule in 1958, providing in 28 U.S.C. § 1332(c) that a corporation should be deemed a citizen not only of its state of incorporation but also "of the State where it has its principal place of business." See *Carden*, 494 U.S. at 196. It remains the rule that corporations are *not* treated as citizens of all states in which they maintain facilities or do business.

peals pointed to changes in the statutory text in 1887 and 1911 as "progressively *eliminating* parity language." Pet. App. 25a (emphasis in original). This characterization, however, wholly ignores this Court's conclusion in *Petri* that the "parity" provisions in the 1882 and 1887 Acts were "intended to have, and must receive, the same effect and operation." See *Petri*, 142 U.S. at 651. Exacerbating this error, the Fourth Circuit entirely failed to acknowledge this Court's conclusion in *Mitchell* and *Herrmann* that the 1911 amendment "was in substance a re-enactment of the earlier provision [of the 1887 Act]." *Mitchell*, 277 U.S. at 216. See *Herrmann*, 238 U.S. at 117-118. Indeed, the court of appeals' opinion does not cite *Herrmann* or *Mitchell* – oversights that go a long way toward explaining the court's misconstruction of the statute.

By the same token, the Fourth Ci :uit misapprehended the import of the elimination of the 1887 Act's final clause, on which the court placed primary reliance in its deconstruction of the statutory history. See Pet. App. 24a-25a (emphasizing repeal of a "clarifying clause about jurisdictional parity"). The language upon which the Fourth Circuit focused stated: "the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state." This confusing clause was hardly a clear statement of the parity principle; as we have noted, it would have *eliminated* diversity jurisdiction for national banks if read literally, although Congress actually intended just the opposite. Moreover, by providing that federal courts would *not* have jurisdiction in cases involving national banks *except* when they would have jurisdiction in like cases over individual citizens, the clause was a *limitation* on the ability of national banks to invoke federal jurisdiction. Removal of this limitation in 1911 accordingly cannot have been intended to make it more *difficult* for national banks to bring their suits to federal court. Instead, as

this Court held in *Herrmann*, the purpose of the deletion was simply to make the statute clearer. 238 U.S. at 117-18.[12]

Second, the Fourth Circuit opined that recognition of the parity principle would establish only that Congress generally intended national and state banks to be subject to diversity rather than federal question jurisdiction, and not "to require that the same rules regarding the technical qualifications for state citizenship must apply both to national banks and to corporations." Pet. App. 26a-29a. Any reasonable application of the concept of parity, however, demands not only that national banks have *no more* access to federal court than state banks, but also that they have *no less* access. This interpretation was expressly stated in the proviso to Section 4 of the 1882 Act and in the comments of its congressional sponsor, who explained that the purpose of that provision was to make the "jurisdictional limits" of national and state banks "one and the same." 13 Cong. Rec. 4049 (1882). That purpose could have been effected only by subjecting national banks to the same jurisdictional rules regarding "technical qualifications for state citizenship" as state banks.

In fact, the Fourth Circuit's reasoning, which requires an affirmative showing that Congress intended the usual diversity rules to apply to national banks, has matters backwards. As we have noted, the Congresses that enacted Section 1348 and its predecessors legislated against the background of a settled rule that deemed corporations (including multistate businesses) to be citizens of only a single state. The Fourth Circuit found it significant that Congress did not *expressly* apply this rule to national banks and did not specify that the diversity rules governing national banks and other corporations would be identical in every jot and tittle. But as a mat-

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[12] Moreover, the Fourth Circuit confused the timing of the statutory modifications. The 1887 proviso was deleted from the national bank jurisdiction statute in 1911 and not, as the court of appeals believed, in 1948. See Pet. App. 24a-25a.

ter of common sense – a principle that the Court often invokes as an aid to statutory construction (see, *e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Koons*, 125 S. Ct. at 470 (Stevens, J., concurring)) – it should not require any special evidence of intent to find that Congress expected the ordinary rules to govern when it provided, using general language, that national banks may rely on diversity to invoke the jurisdiction of the federal courts.

Third, the Fourth Circuit described as "perhaps [the] most telling[]" point regarding the legislative history of Section 1348 that "if Congress desired to 'maintain this parity' between national banks and state corporations * * * it is very surprising that Congress did not adopt similar language in Section 1348 to the language it adopted soon afterward in section 1332(c)(1), enacted in 1958," which "provides for dual citizenship of corporations, in the state of incorporation and at the principal place of business." Pet. App. 29a. The court reasoned that "[i]nterpreting the diversity jurisdiction statute governing national banks in light of the diversity jurisdiction statute governing corporations, as seems reasonable, we would conclude that Congress' use of *entirely different* language in the two reflects that it did *not* intend to adopt the same jurisdictional scheme for national banks as for corporations." *Id.* at 30a (emphasis in original).

If this is the "most telling" point in support of the Fourth Circuit's analysis, however, what it tellingly demonstrates is the weakness of its holding. Given this Court's skepticism of post-enactment legislative history (see, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994)), Congress's failure *in 1958* to amend Section 1348 casts no useful light on the legislative intent ten years earlier when Section 1348 was codified – let alone in 1911 and 1887, when the relevant language was written and put in its current form. Nor can Congress's failure in 1948 to incorporate language in Section 1348 that it did not apply to

other corporations *for another ten years* possibly be thought to signal an intent in 1948 to diminish the diversity jurisdiction then available to national banks.

2. Repeated Congressional Re-enactment Of The "Located" Language Must Be Understood To Endorse Judicial Rulings Interpreting That Language As Requiring Parity In The Treatment Of National Banks And Other Corporations

a. The conclusion that Congress intended Section 1348 to maintain jurisdictional parity finds additional support in the repeated congressional re-enactment of the "located" language *after* it had been interpreted by the courts to call for equivalent treatment for national and state banks. As we have explained, in 1892 this Court held that the 1887 Act's "located" clause was intended to restate the express parity principle of the 1882 Act, and that "[n]o reason is perceived why it should be held that congress intended that national banks should not resort to federal tribunals as other corporations and individual citizens might." *Petri*, 142 U.S. at 650-651. The same "located" provision was used in the 1911 amendment. Later, after the Court held in *Herrmann* and *Mitchell* that the 1911 amendment "was in substance a re-enactment of the earlier provision [of the 1887 Act]" (*Mitchell*, 277 U.S. at 216)), Congress re-enacted essentially identical language in 1948 as Section 1348. This history calls for application of the rule that, "[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998); see also, *e.g.*, *Ankenbrandt* v. *Richards*, 504 U.S. 689, 700-701 (1992).

A lower court decision shortly before the 1948 codification buttresses this conclusion. In 1943, the Ninth Circuit considered the very question presented here: whether a national bank that operated a branch across state lines from its principal place of business should be treated as a citizen of the branch's state for diversity purposes. *Am. Surety Co.* v. *Bank of California*, 133 F.2d 160 (9th Cir. 1943).[13] Applying the statute that was the immediate predecessor of Section 1348, the court of appeals reasoned that "[t]here would appear to be a close analogy between [a national] bank and a corporation national in scope." *Id.* at 162. The court accordingly rejected the contention that a national bank is a citizen of the state in which its branch is located, explaining that such a rule "would be a noteworthy departure from the general rule, and more likely than not Congress would have plainly state[d] such intent." *Ibid.* Presumably aware of this decision (see *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change")), Congress codified the same operative language without change just five years later in Section 1348.

In the face of this consistent understanding of the meaning of "located" prior to codification of the current Section 1348 in 1948, and in the absence of any contrary judicial au-

[13] The bank's main office was in California; it operated a branch in Oregon. See 133 F.2d at 161. Although the court did not address the history of the institution, a predecessor state bank had opened the branch. See ANNUAL REPORT OF THE COMPTROLLER OF THE CURRENCY (Dec. 4, 1922), at 83 (noting that the Bank of California, formerly a state bank, continued to operate branches it had established before obtaining a federal charter). Federal law generally precluded interstate branching by national banks at the time, but state-chartered banks that converted to or combined with national banks were permitted to retain their branches. See note 14, *infra*.

thority at that time, the presumption that Congress intended to embrace the prevailing construction is insurmountable. As Judge Higginbotham put it in his opinion for the Fifth Circuit:

> It is * * * plain that Congress enacted section 1348 against a backdrop of equal access to the federal courts for national banks, state banks, and corporations. Because section 1348 does not have any language modifying or rejecting the interpretive understanding that came with its predecessors, this court should presume that Congress intended to retain and incorporate the existing interpretive backdrop.

Horton v. *Bank One, N.A.*, 387 F.3d 426, 431 (5th Cir. 2004); see also *Firstar*, 253 F.3d at 988; Pet. App. 40a (King., J., dissenting).

b. In reaching the contrary conclusion, the Fourth Circuit relied in large part on a mistaken belief that Congress had modified the law prior to 1948 to permit interstate branching by national banks, and that "Congress was aware of this change, having effected the change itself." Pet. App. 12a; see *id.* at 21a. On this basis, the court concluded that "Congress' re-adoption of the *general* term 'located' in 1948, after it became possible for national banks to locate to other states through branch offices, confirms that Congress did *not* intend to restrict the term to a bank's principal place of business." *Id.* at 12a (emphases in original). But here, the court of appeals was flatly mistaken; interstate branching by national banks was *not* permitted in 1948.

From 1863 until 1927, federal law did not permit *any* branching by a national bank, either within or outside the state where the bank did business. See G. Fischer, AMERICAN BANKING STRUCTURE 42-43 (1968); Wilmarth, *Too Big to Fail, Too Few to Serve? The Potential Risks of Nation-*

wide Banks, 77 IOWA L. REV. 957, 972 & n.51 (1992).[14] Remarking on this history, a congressional report observed in 1994 that the national bank system during this period "was comprised entirely of unit banks" (S. Rep. No. 103-240, 103rd Cong., 2d Sess. 5 (1994)) – *i.e.*, institutions with only a single banking office. See *Horton*, 387 F.3d at 432.

In 1927, Congress passed the McFadden Act, which responded to an explosion in *intra*state branching by state banks by allowing national banks to operate branches within the cities in which they maintained their principal offices, but only to the extent that state banks in the same municipalities were so authorized. See Pub. L. 69-639, 44 Stat. 1224, 1228-1229; *First Nat'l Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 257-58 (1966) (describing Congress's purpose in enacting McFadden Act). Six years later, Congress amended the McFadden Act to allow national banks to establish *intra*state branches outside their home municipalities, but again only to the extent that state-bank branches were afforded the same opportunity. See Pub. L. 73-55, 48 Stat. 162, 189-190; *Walker Bank*, 385 U.S. at 259-261 (describing legislative history of 1933 Act).

[14] Congress permitted state-chartered banks to retain their branches if they converted to or merged with national banking associations. See Act of March 3, 1865, ch. 78, § 7, 13 Stat. 459; Revised Statutes of 1875, 18 Stat. 1, 996, & 1003, § 5155. But national bank branches of any kind during this period were so rare that they could not have figured in congressional consideration of the national bank diversity jurisdiction legislation in 1887 or 1911. "From the early 1860s to the 1890s there was almost no mention of branch banking in Congressional debates and very little discussion of the subject in general." G. Fischer, *supra*, at 25 (footnote omitted). Indeed, as of 1900 only five national banks – out of the more than 12,000 national and state-chartered commercial banks then operating nationwide – maintained any branches at all. See *id.* at 31, 35. And virtually all of these were *intrastate* branches; as of 1922, it appears that only a *single* national bank, the Bank of California, maintained interstate branches. See ANNUAL REPORT OF THE COMPTROLLER OF THE CURRENCY (Dec. 4, 1922), at 83-84. The Fourth Circuit properly did not suggest that the predecessors to Section 1348 were written with that anomalous institution in mind.

The McFadden Act (both as originally enacted in 1927 and as amended in 1933) did not allow national banks to have *inter*state branches. See generally *Northeast Bancorp, Inc.* v. *Board of Governors*, 472 U.S. 159, 169 (1985) (observing that "interstate branch banking was * * * prohibited by the McFadden Act"); Wilmarth, *supra*, 77 IOWA L. REV. at 973-74. When the states began greatly to relax the restrictions on interstate banking by state-chartered banks towards the end of the twentieth century, Congress kept national banks competitive by passing the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (the "Riegle-Neal" Act), Pub. L. 103-328, § 102(b)(1). The Riegle-Neal Act, for the first time, permitted national banks to open new interstate branches – more than 60 years after enactment of the McFadden Act and almost 50 years after enactment of Section 1348.[15]

[15] In 1959, eleven years after Section 1948 was enacted, an amendment to the National Bank Act indirectly allowed operation of a few interstate branches in limited circumstances. See Pub. L. 86-230, 73 Stat. 457 (1959). The 1959 amendment allowed a national bank to move its main office by no more than thirty miles, without addressing whether such a move could be accomplished across state lines. The OCC interpreted the amendment to allow an interstate relocation. See OCC Corporate Decision 95-05 (Feb. 16, 1995), 1995 WL 170344, at *12. Even after an interstate relocation of its main office, a national bank could retain its branches in the state in which its main office had been located, thus allowing for some level of interstate activity. See *id.* at *16-17. The 1959 amendment did not, however, permit a national bank to establish new branches in another state. *Id.* at *14.

The Fourth Circuit thus labored under a crucial misimpression. Because there had been no relevant change in the law governing interstate branching prior to 1948, Congress's re-enactment of the "located" language in that year must be understood to *confirm*, and not to depart from, the view that national banks are located for diversity purposes in only a single state.

3. The Fourth Circuit's Holding Frustrates The Broad Congressional Policy Against Placing National Banks At A Competitive Disadvantage With State-Chartered Banks

Finally, the Fourth Circuit's holding – which subjects national banks to uniquely unfavorable jurisdictional rules arising out of operation of their branches – cannot be reconciled with broader congressional banking policy. Even assuming federal law was not initially designed affirmatively to *favor* national over state-chartered banks (see generally *First Nat'l Bank of Fairbanks* v. *Camp*, 465 F.2d 586, 592 nn.7-8 (D.C. Cir. 1972), cert. denied, 409 U.S. 1124 (1973)), it surely was intended to foster a "policy of equalization" between the two types of institution. See, *e.g.*, *Lewis* v. *Fid. & Deposit Co. of Md.*, 292 U.S. 559, 564 (1934) (noting "policy of equalization" in National Bank Act of 1864 and subsequent amendments); *First Nat'l Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 131 (1969) ("Congress has deliberately settled upon a policy intended to foster 'competitive equality.'"). The *Lewis* Court explained that this policy is repeatedly expressed throughout the national banking statutes – in provisions as diverse as those concerning taxation, the power to operate branches, the power to act as a fiduciary, the amount of interest on deposits, and capitalization. 292 U.S. at 564-65. Accord *Franklin Nat'l Bank of Franklin Square* v. *New York*, 347 U.S. 373, 375 (1954) (in order "[t]hat [national banks] may be at no disadvantage in competition with state-created institutions, the Federal Government has frequently expanded their functions and authority").

Congress has been especially concerned with assuring that national banks are not placed at a competitive disadvantage with respect to the operation of branches. As we have noted, Congress enacted the 1927 McFadden Act, which permitted the operation of intracity branches by national banks, in response to a significant increase in state bank branching during the first two decades of the twentieth century. See *Walker Bank,* 385 U.S. at 257-261; see generally J. Chapman & R. Westerfield, BRANCH BANKING 84-92 (1980 reprint), cited in *Clarke,* 479 U.S. at 411 (Stevens, J., concurring). Six years later, Congress "further strengthened the policy of competitive equality" by permitting national banks to establish intrastate branches wherever state-chartered banks in the jurisdiction had the same authority. *Dickinson,* 396 U.S. at 132. Together, these provisions were "intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned," thus "continuing [Congress's] policy of equalization first adopted in the National Bank Act." *Walker Bank*, 385 U.S. at 261.

"The policy of competitive equality is therefore firmly embedded in the statutes governing the national banking system." *Dickinson*, 396 U.S. at 133. The McFadden Act, in particular, "reflects the congressional concern that neither [the state nor the national bank] system have advantages over the other in the use of branch banking." *Id.* at 131. But the Fourth Circuit's decision, which significantly disadvantages national banks in their ability to invoke federal jurisdiction, fails to heed this concern. Indeed, the Fourth Circuit's reading of Section 1348 marks an extraordinary departure from the deeply rooted federal policy that national banks not be disadvantaged vis-à-vis similarly situated state banks. This inconsistency with the overarching federal interest in (at the least) maintaining equality of treatment between national and state banks – a policy that came into force with enactment of the National Currency Act of 1863 and the National Bank

Act of 1864, and that remains in effect today – strongly suggests that the holding below is wrong.

C. Section 1348's Use Of The Term "Established" Does Not Justify An Expansive Interpretation Of "Located"

For the reasons set out above, the usual tools of statutory construction provide powerful support for the conclusion that Section 1348 does not make national banks citizens of all states in which they operate branches. In reaching the contrary conclusion, the court of appeals placed great weight on Section 1348's use of "two distinct terms to refer to the presence of a banking association." Pet. App. 8a. The first sentence of the statute gives district courts jurisdiction over "any action by a banking association *established* in the district for which the court is held" to enjoin the Comptroller or a receiver acting under his direction; the second sentence provides that, for purposes of other suits, national banks shall be "deemed citizens of the States in which they are respectively *located*." Pointing to the "principle of statutory interpretation that different words used in the same statute should be assigned different meanings whenever possible" (*id.* at 7a), the Fourth Circuit concluded that "established" should be understood "to refer to a bank's charter location," while "located" is taken "to refer to the place or places where [the bank] has a physical presence." *Id.* at 8a. In this way, the court was able to give the two words "independent meaning." *Ibid.*

While the canon of construction invoked by the court of appeals is doubtless a legitimate one, it must yield to more particularized evidence of what Congress actually had in mind. And here, there are compelling reasons to believe that Congress did not attribute any special significance to the use of differing terms in the two sentences of Section 1348.

1. To begin with, the history of interstate branching by national banks belies the Fourth Circuit's analysis. As we

have explained, at the time the terms were placed in Section 1348's predecessors (and at the time of the enactment of Section 1348 itself), national banks could do business in only *one* state. Thus, as the Fifth Circuit put it:

> [W]hen Congress enacted the predecessor of section 1348, "established" and "located" would have been functionally equivalent for jurisdictional purposes because national banks had no branches. * * * It is then difficult to conclude that Congress intended for the two words to have * * * different meanings.

Horton, 387 F.3d at 434.

For its part, the court of appeals did not suggest any practical effect that would have been accomplished by employing words with different meanings in the predecessors to Section 1348, or any purpose that Congress could have been seeking to serve in doing so. Although Wachovia made this point below, the court's only response was premised on its belief that Congress permitted interstate branching by national banks prior to 1948; that meant, in the Fourth Circuit's view, that Congress's re-adoption of the term "located" in 1948 "confirms that Congress did *not* intend to restrict the term to a bank's principal place of business." Pet. App. 12a (emphasis in original). For the reasons noted above, the court's understanding on this point plainly was mistaken.

b. The evolution of Section 1348 also demonstrates that Congress did not attribute special significance to use of the terms "located" and "established." The words, which derived from different predecessors to Section 1348, were not drafted at the same time by the same Congress (had they been, that might have supported the contention that the use of differing words was significant). Instead, Congress first used the word "located" in connection with federal jurisdiction over national banks in the 1887 Act; that statute did *not* use the term

"established" in a locational sense.[16] "Established," in contrast, was used to define jurisdiction in the Revised Statutes of 1875, 18 Stat. 1. Those statutes provided for *federal question* jurisdiction regarding all suits "by or against any banking association established in the district for which the court is held" (Section 629 (Tenth)), as well as over suits by or against "any banking association established in the district for which the court is held, * * * to enjoin the Comptroller of the Currency, or any receiver acting under his direction." Section 629 (Eleventh).

The words "located" and "established" were combined with the codification of the Judicial Code in 1911. At that time, Congress simply put together Section 629 (Eleventh) of the Revised Statutes of 1875 and the "located" clause of the 1887 Act, without making substantive changes to either provision. That combined provision, with immaterial changes, became Section 1348. See pages 17-18, *supra*. Because Section 1348 thus was formed from separate, pre-existing bits that did not at the time convey any different meaning, there is every reason to believe that Congress did not give any thought to, or see any significance in, the use of different words in the provision's two sentences. It may be added that there is nothing surprising or unusual in this imprecise use of language; as the Comptroller pointed out below, this Court itself "used the terms [located and established] interchangeably in 1947, observing that a national bank is a 'citizen' of the state in which it is 'established or located, and in that district alone can it be sued.'" CA4 Comptroller Br. at 8 n.4 (quoting *Cope* v. *Anderson*, 331 U.S. 461, 467 (1947)).

[16] The word "established" did appear in that Act, but it served quite a different purpose: it referred to "national banking associations *established* under the laws of the United States," which were "deemed citizens of the States in which they are respectively located."

c. Other legislative background confirms that Congress could treat the words "established" and "located" as interchangeable. As just noted, the Revised Statutes of 1875 provided for federal jurisdiction over suits by or against "any banking association *established* in the district for which the court is held, * * * to enjoin the Comptroller of the Currency" (§ 629 (Eleventh)); it further provided for federal venue for such suits "where the association is *located*" (§ 763). Thus, under the Fourth Circuit's construction of the language, only one federal district court would have had jurisdiction to enjoin the Comptroller, but venue would have been proper in any district where the bank maintained a branch. That is an anomalous result Congress could not have intended.[17]

D. This Court's Decision In *Bougas* Does Not Support The Fourth Circuit's Interpretation Of "Located" In Section 1348

The final "traditional tool[] of statutory interpretation" upon which the Fourth Circuit relied – in addition to the "ordinary meaning of 'located' [and] its use in juxtaposition with the term 'established'" – was this Court's interpretation of "a parallel venue statute" in *Bougas*. See Pet. App. 9a, 13a-17a. That case involved the prior version of 12 U.S.C. § 94, which governs venue in suits against national banks.[18]

[17] These terms still appear in the law. The word "established" moved from Section 629 of the Revised Statutes to current Section 1348; "located" moved from Section 763 to 28 U.S.C. § 1394. Thus, if the Fourth Circuit were correct, these statutes would still provide for federal venue despite the absence of federal jurisdiction.

[18] The national bank litigant in *Bougas* confined its banking operations to a single state (Georgia); the venue question arose because, although the bank's headquarters were in Savannah, it maintained branches in other Georgia counties. See 434 U.S. at 36-37. Interstate branching of national banks was still prohibited when the

For purposes of that statute, the Court held that a national bank was "located" in every place where it operated a branch. *Bougas*, 434 U.S. at 38.[19]

Perhaps the most striking feature of *Bougas* – as it relates to the issues here – is that this Court did *not* rely on the "plain" or "ordinary" meaning of "located" to reach its conclusion. To the contrary, as noted above, the Court observed that "[t]here is no enduring rigidity about the word 'located'" (434 U.S. at 44), and it "look[ed] to the legislative history to see what light it may afford." *Id.* at 41. Finding "no sure indicators" of congressional intent in that history (*id.* at 43), the Court ultimately based its holding on the policies served by the venue statute:

> What Congress was concerned with was the untoward interruption of a national bank's business that might result from compelled production of bank records for distant litigation. [Citation omitted.] That concern largely evaporates when the venue of a state-court suit coincides with the location of an authorized branch. It is also diminished by improvements in data processing and transportation.

Court decided *Bougas*, and the Court therefore did not address its implications under the venue statute.

[19] At the time *Bougas* was decided, the statute provided that suits against national banks could proceed in a federal court "within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.'" *Bougas*, 434 U.S. at 35-36 (quoting Rev. Stat. § 5198). After *Bougas* was decided, Congress legislatively abrogated the result, amending the statute to provide for venue in suits against national banks that are in receivership with the FDIC only "within the district in which [the bank's] principal place of business is located." 12 U.S.C. § 94.

Id. at 44 (footnotes omitted).

This analysis – premised on an assessment of the purpose and function of the statute – favors the Fifth and Seventh Circuits' interpretation of Section 1348, not the ahistorical approach of the Fourth Circuit. By acknowledging that "located" has no plain meaning and by carefully examining the interests that 12 U.S.C. § 94 was intended to serve, the Court in *Bougas* was faithful to Congress's purpose in enacting the statute. The same approach is called for here.

There are several other reasons why *Bougas* does not support the Fourth Circuit's decision. *First*, this Court expressly limited the holding of *Bougas* to the question of state court venue, refusing to consider the effect of its decision on federal *venue*, much less federal *jurisdiction*. 434 U.S. at 44 n.9. The Fourth Circuit failed to respect this self-restraint when it applied *Bougas* here.

Second, that the Fourth Circuit should not have extended the holding of *Bougas* becomes all the more clear when one considers the respective origins of Section 1348 and 12 U.S.C. § 94. Those provisions originated (and ended up) in different statutes and titles of the United States Code: Section 1348 is a part of the Judicial Act and Judiciary Code, while the venue provision is part of the National Bank Act and is codified in Title 12. See *Horton*, 387 F.3d at 433; *Firstar*, 253 F.3d at 989-990. The principle that a given word may have different meanings in two sections of the *same* statute when the context so indicates (see, *e.g.*, *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 343 (1997)), applies with even greater force when the word in question appears in *different* statutes that were adopted at *different* times and for *different* purposes.

Third, venue and jurisdiction statutes serve fundamentally different goals. As this Court recognized, a venue provision like 12 U.S.C. § 94 is motivated primarily by considerations of convenience; the Congress that enacted

Section 94 was "concerned with * * * the untoward interruption of a national bank's business." *Bougas*, 434 U.S. at 44. A diversity jurisdiction statute like Section 1348, on the other hand, is aimed at the possibility of local prejudice against an out-of-state litigant. See 15 MOORE'S FEDERAL PRACTICE §102App.03[1], at 4-8 (citing cases and historical materials). And a national bank is just as susceptible to such bias – and is in need of just as much protection against it – as any other corporation conducting a national business. See *Firstar*, 253 F.3d at 989-990.[20]

Fourth, this divergence between the aims of Section 1348 and 12 U.S.C. § 94 precludes the application of the *in pari materia* doctrine – the interpretive aid upon which the Fourth Circuit chiefly relied to determine that *Bougas* controlled the reading of Section 1348. See Pet. App. 13a-16a. As Judge King observed below, the *in pari materia* "canon is only applicable * * * when the statutes address the same subject." Pet. App. 42a (citing 2B Norman J. Singer, SUTHERLAND ON STATUTORY CONSTRUCTION § 51.03, at 138 (6th ed. 2004)) (noting that "where the same subject is treated in several acts having different objects the statutes are not *in pari materia*"). Here, there are "basic" and "historic" differences between jurisdiction, which is concerned with a court's power to adjudicate, and venue, which is concerned with the convenience

[20] In response to this point, the court of appeals maintained that "there is not a shred of evidence that Congress, in enacting section 1348, was concerned with shielding national banks from potential bias in the courts of the states where they operate branch[es]." Pet. App. 17a. But there is no such evidence because the Congresses that enacted Section 1348 and its predecessors did not contemplate that national banks would operate interstate branches *at all*. The relevant point here is that Congress chose to make diversity jurisdiction available to national banks and that, in doing so, it surely was motivated by the same policies that underlie the decision to allow other corporations, including state banks, also to invoke diversity.

of litigants and witnesses. See *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). It is these "basic" differences that make the *in pari materia* doctrine inapplicable here.

Fifth, the Fourth Circuit thought it appropriate to rely on *Bougas* because use of the terms "established" and "located" in the venue provision predated enactment of Section 1348's predecessors. The court reasoned that, in using those terms, Section 1348 "adopted precisely the same vocabulary to describe banks' presence as did the then-existing venue statute." Pet. App. 13a.

But it would be misleading to suggest that Congress, when it enacted the 1887 Act and 1911 amendment, had in mind the interpretation of the word "located" that ultimately was rendered in *Bougas*. The Court explained in *Bougas* "that Congress did not contemplate today's national banking system, replete with [intrastate] branches, when it formulated the 1864 Act" (which first made national banks subject to suit in state courts); it also noted that prior to enactment of the McFadden Act "Congress had no occasion whatsoever to be concerned with state-court venue other than at the place designated in the bank's charter." 434 U.S. at 43. Indeed, all of the judicial interpretations of the venue statute that had been rendered prior to the 1948 enactment of Section 1348 indicated that national banks were located *even for venue purposes* in only a single state.[21] As a consequence, even if it

[21] In a decision that predated inclusion of "located" in the 1887 Act, one federal court, addressing use of the word in the predecessor to 12 U.S.C. § 94, found it "quite apparent * * * that congress regards a national banking association as being 'located' at the place specified in the [bank's] organization certificate. If such a place is a place in a state, the association is located in the state." *Manufacturers' Nat'l Bank* v. *Baack*, 16 F. Cas. 671, 673 (S.D.N.Y. 1871). This analysis was repeated in subsequent years. See *Leonardi* v. *Chase Nat'l Bank*, 81 F.2d 19, 22 (2d Cir. 1936) (citing *Baack* for the proposition that "a national bank is 'located'

is assumed that Congress considered the venue statute's use of the words "located" and "established" when it enacted Section 1348's predecessors, there would be no basis for concluding that Congress actually had it in mind at that time that national banks are "located" for venue (let alone jurisdictional) purposes wherever their branches are found. *Bougas* accordingly sheds no useful light on the proper interpretation of Section 1348.

E. National Banks Have One Location Under Section 1348

The foregoing analysis demonstrates that a national bank should not be deemed to be a citizen of every state in which it maintains a branch. That analysis does not, however, determine *which* state is a national bank's location within the meaning of Section 1348. On that question, the Fifth Circuit, the Seventh Circuit, and the Comptroller have reached slightly different conclusions. The Seventh Circuit has held that a national bank is located both in the state specified in its "organization certificate" and in the state of its "principal place of business." *Firstar*, 253 F.3d at 994. The Fifth Circuit has endorsed that holding, but has ruled that a national bank also is located in the state specified in the bank's "articles of association." *Horton*, 387 F.3d at 431. The Comptroller has taken the position that a national bank should be deemed a citizen of "the state in which its principal place of business is located and of the state that was originally designated in its organization certificate and articles of association

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at the place specified in its organization certificate"); *Raiola* v. *Los Angeles First Nat'l Trust & Savings Bank*, 233 N.Y.S. 301, 302 (N.Y. City Ct. 1929) (same). Although the Fourth Circuit pointed to a disagreement in the lower courts about the meaning of the word "located" in the venue statute (Pet. App. 20a), all of the decisions holding that the venue statute reached the locations of branches *post-dated* the enactment of Section 1348. See *Bougas*, 434 U.S. at 39-41 (citing cases).

or, if applicable, the state to which that designation has been changed under other authority[.]" OCC Inter. Ltr. 952, 2003 WL 23221430, at *4. To resolve this case, the Court need not decide which approach is correct, because it is clear that Wachovia cannot be deemed a citizen of South Carolina under *any* plausible test. Cf. *Rotella* v. *Wood*, 528 U.S. 549, 554 & n.2 (2000). In the event the Court wishes to address the point, however, Wachovia sets out its views on the question below.

As we have argued above, Congress intended in Section 1348 that national banks be deemed citizens of only a single state for diversity purposes. And we submit that the state of citizenship is the one identified in the bank's organization certificate, as modified by any designation submitted to the Comptroller moving the institution's main office to a new state pursuant to 12 U.S.C. § 30. That approach focuses on the state where Congress would have regarded a national bank as being "located" at the time of enactment of Section 1348 and its predecessors, while also resting on a close analogy to the citizenship rules applicable to other corporations – rules that, for reasons we have noted, Congress had in mind when it enacted Section 1348.

1. The National Currency Act and National Bank Act require those forming a national banking association to submit to the Comptroller an "organization certificate, which shall specify [t]he place where [the bank's] operations of discount and deposit are to be carried on; designating the State, Territory, or district, and also the particular city, town or village." Rev. Stat. § 5134, 12 U.S.C. § 22.[22] This "place * * * [of] operations of discount and deposit" is the *only* physical location that a national bank must designate in its organization certificate; perhaps for that reason, this Court has referred to

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[22] This provision appeared almost verbatim in the original National Currency Act of 1863. 12 Stat. 665, 666 (1863).

that location as a national bank's "charter address." *Marquette Nat'l Bank of Minneapolis* v. *First Omaha Serv. Corp.*, 439 U.S. 299, 301 (1978). That "charter address," therefore, must be the starting point for determining where a bank is "located" under Section 1348.

As the Comptroller has recognized, however, a complete definition of a national bank's "jurisdictional location" should account for any change in location of the office initially specified in the bank's organization certificate. See OCC Inter. Ltr. 952, 2003 WL 23221430, at *4. A definition that focuses on the organization certificate alone would be incomplete because that certificate is a static, historical document that cannot be amended to reflect a change in the location or activities of a national bank. See *id.* at *3 ("There is no statutory provision or regulatory procedure to change the organization certificate to reflect current conditions. It is a fixed historical document that was used in the organizing process but is not used subsequent to the issuance of the charter by the OCC[.]"); OCC Corporate Decision 95-05 (February 16, 1995) (noting that "the organization certificate itself is a historical document and, unlike the bank's articles of association, is not changed when subsequent changes occur at the bank."). Indeed, the organization certificate cannot be amended even if the bank abandons *all* operations in the state originally designated as the place of "operations of discount and deposit."

Congress made explicit provision for relocation of a national bank in a statute that now appears at 12 U.S.C. § 30(b) (entitled "[l]ocation change"). The precursor to this provision first allowed a change in the location of the banking office specified in a national bank's organization certificate (on an intrastate basis) in 1886, when Congress amended the National Bank Act to permit a national bank to change "the place where its operations of discount and deposit are to be carried on, to any other place within the same State, not more than thirty miles distant * * * ." 24 Stat. 18, 18 (1886). In

1959, Congress amended this provision again. Pub. L. 86-230, 73 Stat. 457 (1959). Among other things, the 1959 amendment changed the phrase "place where [the bank's] operations of discount and deposit are to be carried on" to "main office." Though neither the 1959 amendment nor any subsequent legislation has specifically defined "main office" as used in Section 30(b), the Comptroller has taken the sensible position that the terms "main office" and "place [of] * * * operations of discount and deposit" as used in Section 22 are synonymous. OCC Inter. Ltr. 952, 2003 WL 23221430, at *1-2. This position is entitled to substantial deference. *Smiley*, 517 U.S. at 739; *Nationsbank of North Carolina, N.A.* v. *Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995); *Clarke*, 479 U.S. at 403-404.

Under current law, a national bank may relocate its main office both on an intrastate basis and across state lines. 12 U.S.C. § 30. It is required to notify the Comptroller of such a relocation and, in certain cases, to secure the Comptroller's approval. *Ibid.*; 12 C.F.R. § 5.40. If (but only if) the relocation requires the approval of the Comptroller, the bank must also amend its articles of association to include the location of the new "main office." 12 C.F.R. § 5.40.[23] As the Comptroller has explained, "[a] national bank's change of its original designated state is akin to a state entity changing its state of organization by reincorporating in a new state." OCC Inter. Ltr. 952, 2003 WL 23221430, at *4.

2. In light of these authorities, Wachovia submits that a bank is "located" under Section 1348 in the state of its "charter address," as designated in the bank's organization certificate, *unless* the bank has designated a new "main office." If the bank has moved its main office pursuant to 12 U.S.C.

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[23] Thus, a bank may in some instances redesignate its main office without amending its articles of association. For that reason, defining the place of citizenship by reference to the articles of association would be either redundant or misleading.

§ 30, the new main office should be the location of the bank under Section 1348. *Cf.* OCC Inter. Ltr. 952, 2003 WL 23221430, at *4 (concluding that a national bank's jurisdictional location should include the state to which the bank's designated office location in its organization certificate has been changed).

This test accords with congressional intent by focusing on the state identified in the bank's organic documents – the state that Congress presumably would have regarded as the jurisdictional location of a corporate entity at the time Section 1348 and its predecessors were enacted.[24] In addition, this test has the virtue of focusing on a bank's *current* main office, disregarding an office that a bank designates initially in its organization certificate but later abandons. And the location to which this test points is readily determined by reference to the public record (either the bank's organization certificate or the notice that a bank is required to file with the Comptroller when changing the location of its main office).

Under the proper test, the decision below must be set aside. It is undisputed that Wachovia's main office is in North Carolina.[25] It accordingly must be deemed a citizen of

[24] In the Riegle-Neal Act, Congress provided that a national bank's "home state" – a term used in that Act to limit the scope of permissible branching – is "the State in which the main office of the bank is located." 12 U.S.C. § 1831u(g)(4)(A)(i). As the Comptroller has noted, "[t]his suggests Congress viewed the main office of a national bank as a way to designate a state that was comparable to the state of incorporation for a state bank." OCC Inter. Ltr. 952, 2003 WL 23221430, at *3.

[25] The organization certificate of the predecessor institution to Wachovia, First Fidelity Bank, identified Salem, New Jersey, as the location where it carried on its "operations of discount and deposit." A series of consolidations and main office relocations pursuant to 12 U.S.C. § 30 ultimately concluded in 2002, with the institution's main office now located in Charlotte, North Carolina.

that State for purposes of Section 1348. Because respondents all are citizens of South Carolina, diversity jurisdiction is present in this case. The Fourth Circuit's judgment that jurisdiction is lacking accordingly should be reversed and the case remanded for resolution of the merits of Wachovia's petition to compel arbitration.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

WACHOVIA BANK, NATIONAL ASSOCIATION,
Petitioner,

—v.—

DANIEL G. SCHMIDT III, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE CLEARING HOUSE ASSOCIATION L.L.C. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

28 U.S.C. § 1348 provides that, with limited exceptions that are inapplicable here, "[a]ll national banking associations shall . . . be deemed citizens of the States in which they are respectively located."

The question presented is whether, for purposes of federal diversity jurisdiction, a national banking association is "located" in, and thus deemed to be a citizen of, every state in which the association is "physically present," as held by the Fourth Circuit, or instead has a more limited citizenship, as held by three other courts of appeals.

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INTRODUCTION

The Clearing House Association L.L.C. (the "Clearing House") submits this brief as *amicus curiae* in support of petitioner.[1]

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Clearing House is an association of eleven leading commercial banks that provides payment, clearing and settlement services to its member banks and other financial institutions.[2] The Clearing House often appears as *amicus curiae* in cases that raise significant legal issues relating to the commercial banking industry. The members of the Clearing House include eight federally chartered national banking associations ("national banks"). Five of these eight national banks have branches in sixteen or more states and one of those five has branch offices in thirty states. (For this purpose, we include the District of Columbia as a "state.")

The members of the Clearing House have a substantial interest in preserving their access to the federal judicial system. Affirmance of the Fourth Circuit

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[1] This brief is filed with the written consent of Petitioner and Respondents. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored any portion of this brief, nor did any person or entity other than the *amicus curiae* make any monetary contribution to the preparation or submission of this brief.

[2] The members of the Clearing House are Bank of America, N.A.; The Bank of New York; Citibank, N.A.; Deutsche Bank Trust Company Americas; HSBC Bank U.S.A., N.A.; JPMorgan Chase Bank, N.A.; LaSalle Bank, N.A.; UBS AG; U.S. Bank N.A.; Wachovia Bank, N.A. (petitioner herein); and Wells Fargo Bank, N.A.

decision, and concomitant rejection of the decisions of three other Courts of Appeals, would deprive national banks of their ability to invoke diversity jurisdiction whenever an adverse party is a citizen of a state in which the national bank maintains a branch office or has some other physical presence. For three members of the Clearing House, such a rule would preclude diversity jurisdiction whenever a citizen of twenty-four or more states is an adverse party.[3]

More generally, the members of the Clearing House, as leading U.S. banks, have a direct interest in assuring that national banks not be placed at a competitive disadvantage in respect of state-chartered banks and other state-chartered corporations, in accordance with long-standing and clearly-articulated congressional policy. A state-chartered bank such as SunTrust Bank, with branches in eleven states and the District of Columbia,[4] is for diversity purposes a citizen of at most two states. 28 U.S.C. § 1332. Yet, according to the Fourth Circuit, petitioner Wachovia – a bank chartered under federal law – is "located" in and therefore a citizen of at least fifteen states and the District of Columbia.

There is no logic to this result, and no good reason to force Wachovia to litigate in local courts while a state-chartered bank with branches in the same states has available to it the option to litigate in a federal court whenever the amount in controversy exceeds $75,000. There is likewise no logic or policy reason to deprive national banks of the same access to the federal judicial system as is enjoyed by brokerage firms (for example, Merrill Lynch has offices in fifty states), insurance companies and other financial institutions, or, more generally, all other corporations (many large corporations, such as Wal-Mart, may have a "physical presence" in all fifty states).

Restricting national banks' access to the federal judicial system through diversity jurisdiction – while state-chartered banks and corporations face no comparable limitation – puts national banks, for these purposes, very much into the category of second-class entities. This Court's adoption of the Fourth Circuit's

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[3] According to the FDIC, the eight national bank-members of *amicus curiae* have branch offices in these numbers of states:

National banks that are Clearing House members	Number of states (including the District of Columbia) in which the bank has branch offices
Bank of America, N.A.	30 states
U.S. Bank N.A.	25 states
Wells Fargo Bank, N.A.	24 states
JPMorgan Chase Bank, N.A.	18 states
Wachovia Bank, N.A.	16 states
HSBC Bank U.S.A., N.A.	9 states
LaSalle Bank N.A.	1 state
Citibank, N.A.	1 state

FDIC Institutional Directory, http://www.fdic.gov/idasp/main.asp (last visited Aug. 15, 2005). In addition, the above national banks undoubtedly have a "physical presence" – such as an office or even an ATM – in states where they do not have a branch. Further, Bank of America has military branches in one state not reflected in the FDIC count, and LaSalle Bank also has a branch in a state not counted by the FDIC.

[4] *See* FDIC Institutional Directory, http://www.fdic.gov/idasp/main.asp (last visited Aug. 15, 2005).

approach would force national banks to litigate numerous actions in local courts that in effect may be "home town" courts for their adversaries. Indeed, this is already occurring; since issuance of the Fourth Circuit decision in December 2004, at least five pending cases within the Fourth Circuit (in addition to this action) have been dismissed or remanded to state courts because the national bank has a branch in the adverse party's state.[5]

The five largest banks in the United States, as measured by assets, are national banks, and there are at least 164 national banks with branches in multiple states.[6] Affirmance of the Fourth Circuit decision would significantly restrict access to federal courts by a substantial portion of the banking industry, and thus deprive them of the recognized greater certainty, sophistication, fairness and uniformity provided by the federal judiciary.[7] Affirmance would also create a disincentive for national banks to expand their interstate operations, counter to congressional policy.

STATEMENT OF THE CASE

A divided panel of the United States Court of Appeals for the Fourth Circuit held that diversity jurisdiction was unavailable in an action between a citizen of a state and a national bank headquartered and chartered elsewhere but maintaining a branch in that state. This decision, which six of the nine voting judges of that court would have reconsidered en banc,[8] was

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[5] *Coots* v. *Wachovia Sec., Inc.*, 114 F. App'x 586 (4th Cir. 2004) (remand); *Nat'l Union Fire Ins. Co.* v. *Mfrs. & Traders Trust Co.*, No. 03-2276 (4th Cir.) (Order of Jan. 28, 2005, dismissing First Union, N.A. as a dispensable, non-diverse party); *Friel Prosthetics, Inc.* v. *Bank of America, N.A.*, No. Civ. A. DKC 2004-3481, 2005 WL 348263 (D. Md. Feb. 9, 2005) (remand); *Halifax Corp.* v. *Wachovia Bank, N.A.*, No. Civ. A. 03-578-A, 2005 WL 1799507 (E.D. Va. July 21, 2005) (dismissal); *Wachovia Bank, N.A.* v. *Ranson*, No. 04 CV 174, 2005 WL 555587 (W.D. Va. Feb. 28, 2005) (dismissal).

[6] *See* FDIC Institutional Directory, http://www.fdic.gov/idasp/main.asp (last visited Aug. 15, 2005). It is virtually certain that additional national banks have offices of operating subsidiaries, ATMs or some other physical presence in multiple states.

[7] *See, e.g., Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2618 (2005) ("[The] purpose of the diversity requirement . . . is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants."); THE FEDERALIST NO. 80, at 538 (Alexander Hamilton) (Jacob Cooke, ed. 1961) (asserting that "the federal courts [are] the proper tribunals for the determination of controversies between different states and their citizens" because "state tribunals cannot be supposed to be impartial"); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1803 (1992) ("The dangers of prejudice [against out-of-state parties] may often be subtle, but that only makes them more insidious."); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 375 (1992) (surveying lawyers in removal cases and finding "that perceived bias against out-of-state litigants is still frequently reported, especially in less urban areas, and federal judges are perceived to be superior to their state court counterparts.").

[8] The Fourth Circuit decision was authored by Judge Luttig and joined by Judge Beezer, a Senior Circuit Judge of the Court of Appeals for the Ninth Circuit sitting by designation.

(footnote cont'd)

based on the Fourth Circuit's view that the word "located," as used in 28 U.S.C. § 1348, means wherever "physically present." The Fifth, Seventh and Ninth Circuits have rejected that interpretation, which is flatly at odds with the purposes of the National Bank Act and the history of Section 1348 itself.

SUMMARY OF ARGUMENT

Unless the Fourth Circuit decision is reversed, national banks will be deprived of access to the federal courts in many circumstances where state-chartered banks and corporations could invoke diversity jurisdiction. This would be contrary to the purposes behind the National Bank Act, including Congress' 1994 decision to encourage the growth of national banks across state lines, and would also frustrate the long-standing congressional policy of not placing national banks at a competitive disadvantage in relation to state-chartered banks. A critical element of this policy is jurisdictional parity. Indeed, as this Court long ago stated, Congress "intended to put national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States." *Leather Mfrs.' Nat'l Bank* v. *Cooper*, 120 U.S. 778, 780 (1887). In light of this, it was error for the Fourth Circuit to hold that a national bank is "located" for

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(footnote cont'd)

Judge King dissented. *Wachovia Bank, N.A.* v. *Schmidt*, 388 F.3d 414 (4th Cir. 2004). When Wachovia sought rehearing en banc, six of the Circuit's judges voted to grant the petition, while three voted against it, and four recused themselves. Although six of the nine voting judges agreed to grant the petition, rehearing was denied because the Fourth Circuit's rules then required that a majority of the thirteen active judges vote in favor.

purposes of 28 U.S.C. § 1348 in every state in which it is "physically present." 388 F.3d at 417. Other Courts of Appeals have rejected the Fourth Circuit's interpretation and thus have declined to create the anomalous rule that the doors of federal courts are closed to federally-chartered national banks in circumstances where they are open for state-chartered entities.

ARGUMENT

I. THE FOURTH CIRCUIT DECISION IS AT ODDS WITH A FUNDAMENTAL PURPOSE OF THE NATIONAL BANK ACT.

A. National Banks Are Creatures of Federal Law, Established with the Express Purpose of Exempting Them from State Interference.

Congress established national banks through legislation in 1863, subsequently amended by the 1864 National Bank Act.[9] Through the creation of national banks, Congress established a national banking system separate and independent from the existing state-chartered banks. *Tiffany* v. *Nat'l Bank of Missouri*, 85 U.S. 409, 412-13 (1873). As Senator Sumner explained, a national bank "must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively under that Government from which it derives its functions." CONG. GLOBE, 38th Cong., 1st Sess. 1893 (1864) (statement of Sen. Sumner).

Consistent with Congress' purpose in limiting state regulation of national banks, the National Bank Act

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[9] Act of June 3, 1864, ch. 106, 13 Stat. 99. The Act of June 3, 1864 was retitled the National Bank Act by the Act of June 20, 1874, ch. 343, 18 Stat. 123 (1874) (codified at 12 U.S.C. § 38).

protects national banks from state "visitorial" powers. 12 U.S.C. § 484(a) ("No national bank shall be subject to any visitorial powers except as authorized by Federal law . . . ."). Instead, the Office of the Comptroller of the Currency has, subject to certain exceptions, exclusive visitorial powers over national banks. 12 C.F.R. § 7.4000.

This Court has consistently acknowledged the unique status of national banks and the limits placed on state interference with those institutions by the National Bank Act. As this Court stated in 1927: "National banks are . . . agencies of the United States, created under its laws, to promote its fiscal policies . . . ." *First Nat'l Bank* v. *City of Hartford*, 273 U.S. 548, 550 (1927) (internal quotations omitted). *See also Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 283 (1896) ("National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States."), *quoted in Marquette Nat'l Bank* v. *First Omaha Serv. Corp.*, 439 U.S. 299, 308 (1978); *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 10 (2003) ("[T]his Court has also recognized the special nature of federally chartered banks. Uniform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from 'possible unfriendly State legislation.'") (internal citation omitted).

In short, national banks are creatures of federal law, and their "special nature" precludes any undue or excessive interference or authority by the states. The Fourth Circuit's decision to force federally-created national banks to litigate many cases in local courts – when state-chartered legal entities are free to choose a federal forum – is inconsistent with those fundamental principles.

B. Congress Intended that National Banks Not Be Placed at a Competitive Disadvantage.

The provisions and amendments of the National Bank Act reveal Congress' consistent goal of ensuring that national banks not be placed at a competitive disadvantage in relation to state-chartered banks. For example, in the National Bank Act of 1864, Section 4 limited the tax rate on national banks to the rate imposed on state-chartered banks, and Section 30 permitted national banks to charge the same rate of interest as state-chartered banks.

During the last century, a particular concern of Congress was to avoid competitive disadvantage in branch banking. The McFadden Act, Pub. L. No. 69-639, § 6, 44 Stat. 1224, 1228 (1927), together with the Banking Act of 1933 (the Glass-Steagall Act), 48 Stat. 189, 190 (1933), permitted national banks to establish intrastate branches to the same extent state-chartered banks were allowed to do so. *See* 12 U.S.C. § 36(c)(1)-(2). Indeed, this Court noted almost forty years ago that "[i]t appears clear from this resume of the legislative history of [the McFadden and Glass-Steagall Acts] that Congress intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned." *First Nat'l Bank* v. *Walker Bank*, 385 U.S. 252, 261 (1966). In 1969, this Court reiterated that the McFadden Act "reflects the congressional concern that neither system have advantages over the other in the use of branch banking." *First Nat'l Bank* v. *Dickinson*, 396 U.S. 122, 131 (1969). "The policy of competitive equality is . . . firmly embedded in the statutes governing the national banking system." *Id.* at 133.

Congress continued generally to further this goal, and with respect to branching in particular, in the 1994 Riegle-Neal Act, which forbids states from treating national bank branches less favorably than state-chartered

banks. *See* Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328 § 102, 108 Stat. 2338, 2350 (1994) (codified at 12 U.S.C. § 36(f)(1)) (requiring that where federal preemption does not apply, a host state's laws "regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches shall apply to [in-state branches of national banks] to the same extent as [to state banks]").

It is thus fundamental to our dual banking system that national banks not be placed at a competitive disadvantage to state-chartered banks. Nowhere is this policy more consistently and extensively stated than with respect to branching.

C. Congress Has Encouraged the Growth of National Banks and, in 1994, Authorized Such Banks To Expand Widely Across State Lines.

Congress has long supported the growth and development of national banks. In *Tiffany*, 85 U.S. at 413, this Court explained that national banks:

> were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks. On the contrary, much has been done to insure their taking the place of State banks.

Consistent with this basic approach, Congress sought to facilitate the growth of national banks, first within the states through the McFadden Act (*see*, p. 9, *supra*), and finally – just eleven years ago – among the states.[10] In 1994, Congress for the first time made widespread interstate branch banking lawful for both national banks and state-chartered banks through the Riegle-Neal Act. Pub. L. No. 103-328, §§ 102-103, 108 Stat. 2338, 2349, 2352 (1994) (amending 12 U.S.C. §§ 36 & 1842(d)). As a result, interstate banking by both national banks and state-chartered banks has in the past decade grown dramatically; today, national banks have more than 16,000 interstate branches and state-chartered banks have almost 6,000 interstate branches.[11]

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[10] The 1927 McFadden Act, together with the 1933 Glass-Steagall Act, authorized the creation of multiple *intra*state branches for national banks to the same extent as permitted by state law for state banks, and did not authorize *inter*state branch banking except in very limited exceptions. These "grandfather" exceptions were for branch bank offices that already existed for twenty-five years, and existing branches of a state bank that converted to a national bank (a recodification of an exception that dates back to 1865). *See* 44 Stat. 1224; *see also* Act of March 3, 1865, ch. 78, § 7, 13 Stat. 459. It appears that there were only two "grandfathered" banks. (*See* p. 13, *infra*.)

[11] *See* Conference of State Bank Supervisors, Number of Commercial Banks by Charter (2004), http://csbs.org/pr/presentations/2004/StateBankingStatisticsJuly2004.pdf (last visited Aug. 15, 2005).

II. 28 U.S.C. § 1348 REQUIRES JURISDICTIONAL PARITY BETWEEN NATIONAL BANKS AND STATE-CHARTERED BANKS.

A. The Legislative History of 28 U.S.C. § 1348 Demonstrates Congress' Intent To Place National Banks and State-Chartered Banks on an Equal Footing.

Although Congress initially granted federal courts jurisdiction over all suits to which a national bank was a party, in 1882 Congress eliminated automatic federal question jurisdiction for national banks in an amendment to the National Bank Act (the "1882 Amendment"). *See Leather Mfrs.' Nat'l Bank*, 120 U.S. at 780-81. The 1882 Amendment expressly provided that jurisdiction over national banks "shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States . . . ." Act of July 12, 1882, ch. 290, 22 Stat. 162, 163. A congressional sponsor also explained that the 1882 Amendment "declares that the jurisdictional limits for and as to a national bank shall be the same as they would be in regard to a State bank . . . ." 13 CONG. REC. 4049 (1882) (statement of Rep. Hammond), *quoted by Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 566 n.22 (1963).

In 1887, Congress revised the jurisdictional statute to say that "national bank associations . . . shall . . . be deemed citizens of the States in which they are respectively located . . . ." Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, 554 (the "1887 Act"). No substantive change was intended: the 1887 Act indicated that Congress intended to maintain jurisdictional parity between national banks and state banks: "[I]n such cases [involving national banks,] the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State." 24 Stat. at 554-55.

In 1911, Congress again revised the relevant statute, using language in material respects identical to the current statute: "[A]ll national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located." Judicial Code of 1911, Pub. L. No. 61-475, § 24, 36 Stat. 1087, 1093 (1911). This Court concluded that the 1911 amendment was not intended to change the meaning of the statute in any respect. *Federal Intermediate Credit Bank* v. *Mitchell*, 277 U.S. 213, 216 (1928) (explaining that "no change of intent is to be implied unless clearly made manifest"). *See also Hermann* v. *Edwards*, 238 U.S. 107, 118 (1915).

In 1948, Congress codified the 1911 provision as 28 U.S.C. § 1348, which similarly provides that, with limited exceptions that are inapplicable here, "[a]ll national banking associations shall . . . be deemed citizens of the States in which they are respectively located." Section 1348 has not been altered since the 1948 codification.

As shown above (*see* pp. 10-11, *supra*), when 28 U.S.C. § 1348 was last revised in 1948 virtually no interstate branch banking existed or was permitted. *See also Girard Bank* v. *Bd. of Governors of Fed. Res.*, 748 F.2d 838, 840 (3d Cir. 1984) (noting that "[t]he McFadden Act, as a general matter, confined national banks to intrastate branching," and that "only two national banks . . . were permitted to maintain interstate branches under the Act's 'grandfather clause'"). Thus, directly contrary to a central thesis of the Fourth Circuit's decision (388 F.3d at 421, 424), in 1948 Congress could not have intended the word "located" to refer to branch bank offices in multiple states because there was then virtually no interstate branch banking. And given the long history of the predecessors to Section 1348, it is

crystal clear that Congress did not intend for that statute to put national banks at a disadvantage when it comes to obtaining access to our federal courts.

B. This Court Has Consistently Recognized Congress' Policy of Maintaining Jurisdictional Parity.

This Court has recognized the important congressional policy of jurisdictional parity between national banks and state-chartered banks. In *Leather Manufacturers' National Bank*, the Court interpreted the 1882 Amendment as placing "national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States." 120 U.S. at 780; *see also Petri* v. *Commercial Nat'l Bank*, 142 U.S. 644, 649 (1892) (stating that the 1882 Amendment "placed [national banks] in the same category with banks not organized under the laws of the United States"); *Langdeau*, 371 U.S. at 566 ("[The 1882 Act] apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited."). This Court also observed in analyzing the 1887 Amendment that "[n]o reason is perceived why it should be held that Congress intended that national banks should not resort to federal tribunals as other corporations and individual citizens might." *Petri*, 142 U.S. at 650-51.

III. THE WORD "LOCATED" IN 28 U.S.C. § 1348 DOES NOT MEAN "PHYSICALLY PRESENT."

As shown above, Congress intended that national banks not be competitively disadvantaged in relation to state-chartered banks, and that those entities have "parity" when it comes to federal court jurisdiction. Instead of interpreting 28 U.S.C. § 1348 to reflect these long-standing principles, the Fourth Circuit erred by looking no further than certain selected dictionaries to

define the word "located," and declaring that the word is "unambiguous." This is contrary to the interpretation of three Courts of Appeals and the Office of the Comptroller of the Currency.

A. Three Courts of Appeals and the Federal Regulator of National Banks Have Interpreted "Located" Differently from the Fourth Circuit.

The Fourth Circuit's view of the meaning of 28 U.S.C. § 1348 is contrary to recent decisions from the United States Courts of Appeals for the Seventh and Fifth Circuits. In *Firstar Bank, N.A.* v. *Faul*, 253 F.3d 982, 986 (7th Cir. 2001), the Seventh Circuit found that "[t]he language of the 1887 Act, [including the 'located' language in 28 U.S.C. § 1348], has been consistently interpreted by the Supreme Court to maintain jurisdictional parity between national banks and state banks or other corporations." As a result, the court concluded that "for purposes of 28 U.S.C. § 1348 a national bank is 'located' in, and thus a citizen of, the state of its principal place of business and the state listed in its organization certificate." *Id.* at 994. Similarly, in *Horton* v. *Bank One, N.A.*, 387 F.3d 426, 430 (5th Cir. 2004), the Fifth Circuit noted that "[t]he Supreme Court has concluded that the objective of the 1882 and 1887 Acts was to create jurisdictional parity between national banks on the one hand and state banks and corporations on the other." The Fifth Circuit concluded that the "goal of jurisdictional parity is best served by interpreting 'located' as referring to a national bank's principal place of business as well as the state specified in the bank's articles of association." *Id.* at 431.

Indeed, as early as 1943, the Ninth Circuit addressed the predecessor statute to 28 U.S.C. § 1348 and held that one of the two national banks with grandfathered interstate branches, Bank of California, was *not* a citizen of a state in which it maintained a

branch. *American Surety Co.* v. *Bank of California*, 133 F.2d 160, 162 (9th Cir. 1943). In reaching this decision, the court found that "[t]here would appear to be a close analogy between [a national] bank and a corporation national in scope." *Id.* Although this decision was reached over sixty years ago, it is particularly relevant because it was the only Court of Appeals decision precisely on point when Congress codified Section 1348 five years later.[12]

Consistent with the above decisions, the Office of the Comptroller of the Currency ("OCC")[13] concluded in 2002 that "located" in 28 U.S.C. § 1348 means the state where a national bank has its main office. Three years ago, in response to a request for an interpretation of the word "located" in Section 1348, the OCC stated that "[n]ational banks are to be treated for diversity jurisdiction purposes in a manner similar to state banks" and that "located" means "the place where the bank's main office is currently located . . . ." Bank of America, OCC Interpretive Letter No. 952, 2003 WL 23221430, at *4, 1 (Oct. 23, 2002). This interpretation is respectful of the principle of jurisdictional parity.

Because the provision in question was originally enacted as part of the National Bank Act, the

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[12] If the Fourth Circuit regards the enactment of Section 1332 ten years after Section 1348 as "soon afterward" (388 F.3d at 431), then the five-year gap between the *Bank of California* decision and the enactment of Section 1348 must be "very soon afterward."

[13] The OCC – a bureau of the Department of the Treasury – charters, regulates and supervises all national banks. *See* Comptroller of the Currency Administrator of National Banks: http://www.occ.treasury.gov/aboutocc.htm.

interpretation of the OCC (the regulator of national banks) should be given weight. *See Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.")[14]

Thus, the rulings of three Courts of Appeals, and the OCC's interpretation, all reject the Fourth Circuit's holding that "located" in Section 1348 means wherever "physically present." National banks should be entitled to invoke diversity jurisdiction in circumstances where state-chartered banks or corporations can do so.

B. The Word "Located" Should Not Be Interpreted in Isolation.

The Fourth Circuit came to its erroneous conclusion in large part because it defined the word "located" in Section 1348 by relying upon certain selected dictionary definitions, 388 F.3d at 416-18, and as

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[14] Although the OCC's regulatory mandate does not include administering 28 U.S.C. § 1348, its responsibilities and expertise put it in a special position to reflect accurately the congressional intent behind the National Bank Act and the principle of jurisdictional parity. *Cf. Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 403-04 (1987) ("The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of th[e] principle" that "courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute."); *NationsBank* v. *Variable Annuity Life Ins.*, 513 U.S. 251 (1995) (deferring to the OCC's interpretation of the term "the business of banking" in the National Bank Act).

a result the court gave short shrift to the context and history of the statutory language.[15] This was clear error. Resorting to a dictionary ought not to substitute for understanding a statute's meaning by examining the necessary context, particularly when there are differing dictionary definitions. *See Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997) (explaining that the interpretive inquiry is limited to the statute and the language itself only when "the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case"); *see also Phillips* v. *AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc) ("The main problem with elevating the dictionary to such prominence is that it focuses the inquiry on the abstract meaning of words rather than on the meaning of [] terms within the context . . . ."). Indeed, in *Firstar Bank*, the Court of Appeals for the Seventh Circuit consulted three dictionaries, including WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1327 (1993) (defining "locate" as "to set or establish in a particular spot or position"), and concluded that "the ordinary definition of 'located' does not provide a clear answer to" interpreting Section 1348. 253 F.3d at 987. In this action as well, Judge King's dissent demonstrated that because different dictionaries define the word "located" differently, the choice of a dictionary could very well change the outcome. *See* 388 F.3d at 434, where Judge King cited the definition of "location" in BLACK'S LAW DICTIONARY 958 (8th ed. 2004) as "[t]he *specific* place or position of a person or thing" (emphasis added).

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[15] The Fourth Circuit cited no statutory language or legislative history indicating that Congress intended Section 1348 to create a competitive disparity.

The word "located" is used in a number of provisions of the National Bank Act, and this Court has concluded on each occasion that it has been called upon to examine the meaning of "located" that there is no simple, plain meaning of the word, but that a contextual analysis is necessary. For example, in *Citizens & Southern National Bank* v. *Bougas*, 434 U.S. 35, 44 (1977), this Court recognized that "[t]here is no enduring rigidity about the word 'located.'"[16] In *Bougas*, the Court looked to legislative history to interpret "located" in the context of state-court venue.[17] Similarly, in *Marquette*

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[16] Consistent with this conclusion, the National Bank Act itself uses the word "located" to mean different things in different provisions. *Compare* 12 U.S.C. § 29 (discussing "the law of the state in which the association is located"), *with* 12 U.S.C. § 36(j) (defining "branch" to include "any branch place of business located in any State or Territory of the United States . . . ."). If the word "located" were unambiguous, then that word presumably could not have these different meanings.

[17] In *Bougas*, the Court concluded, in light of the relevant legislative history, that for the purposes of state-court venue, a national bank is deemed to be located at each of its branch bank offices. The Court found "[w]hat Congress was concerned with was the untoward interruption of a national bank's business that might result from compelled production of bank records for distant litigation," a concern that "largely evaporates when the venue of a state-court suit coincides with the location of an authorized branch." 434 U.S. at 44. The *Bougas* case did not touch upon diversity jurisdiction, where the concerns are far different. Although the Fourth Circuit maintained that jurisdiction and venue are the same subject matter for purposes of its *in pari materia* argument (388 F.3d at 420), they are not. Jurisdiction relates to *whether* the federal courts are available; venue relates to *which* federal (or state) courts are available. Perhaps even more importantly, the

(footnote cont'd)

National Bank, this Court again looked to legislative history for guidance in defining "locate" in the context of a provision of the National Bank Act governing interest rates, and concluded that "[t]he congressional debates surrounding the enactment of [the provision] were conducted on the assumption that a national bank was 'located' for purposes of the section in the State named in its organization certificate." 439 U.S. at 310 (citing CONG. GLOBE, 38th Cong., 1st Sess. 2123-27 (1864)).

Moreover, in interpreting another statute, this Court has explicitly rejected the "physical presence" definition of "located" that the Fourth Circuit adopted from consulting dictionaries. In the context of the Natural Gas Act, this Court wrote, "we think that 'is located' means more than having physical presence or existence in a place . . . ." *Federal Power Comm'n* v. *Texaco, Inc.*, 377 U.S. 33, 38 (1964). In *Texaco*, the venue provision in the Natural Gas Act stated that a natural gas company may obtain review in the United States Court of Appeals where it "is located or has its principal place of business, or in the United States court of appeals for the District of Columbia." *Id.* at 37. This Court looked to the context and examined the language used in predecessor statutes to determine that "located" – for purposes of that statute – means only a corporation's state of incorporation. The point, of course, is that a selected dictionary definition of "located" may not

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(footnote cont'd)

critical policy issue here, jurisdictional parity between national and state-chartered banks, was not a consideration in *Bougas*.

provide – in view of the overall context – the most logical or sensible interpretation.[18]

The Fourth Circuit's decision to make the meaning of 28 U.S.C. § 1348 turn on a particular dictionary definition led to a result that is "at war with" the long legislative and judicial history of that statute and the National Bank Act. *Cf. Continental Illinois Nat'l Bank* v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648, 684 (1935) (rejecting a construction of "wherever located" that was "at war with the whole spirit and purpose of the law").

C. "Located" in Section 1348 Does Not Mean "Physically Present."

28 U.S.C. § 1348 was enacted long before Congress passed the 1994 Riegle-Neal Act authorizing banks to open branch offices in multiple states.[19] In 1948, Congress thus necessarily understood national banks to be "located" in one state only. Under those circumstances, Congress could not have intended by Section 1348 to put national banks at a disadvantage for

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[18] If the word "located" necessarily and unambiguously means wherever one has a physical presence, then the six words after "located" in 12 U.S.C. § 92, "located and doing business in any place," are superfluous. Of course, Section 1348 does not contain the words "and doing business in any place."

[19] The Fourth Circuit inaccurately stated that Congress made interstate branch banking lawful prior to the 1948 codification of 28 U.S.C. § 1348. 388 F.3d at 421; *see* pp. 10-11, *supra*. This error apparently led the Fourth Circuit to assume that Congress used the word "located" in Section 1348 with interstate branch banking in mind.

purposes of gaining access to federal courts in diversity cases.

Moreover, the Fourth Circuit's interpretation of "located" makes no sense in light of the statute's language and purpose. 28 U.S.C. § 1348 is made up of two sentences. The first places three types of legal actions involving national banks under the original jurisdiction of the federal district courts.[20] The second – the sentence at issue here – has now been interpreted by the Fourth Circuit to limit drastically the access of national banks to the federal courts. This is exactly contrary to Congress' intent, going back to the 1860's, to ensure that national banks have jurisdictional parity. *See* pp. 12-14, *supra*.

D. In the Context of Modern Banking, the Fourth Circuit's Decision Would Unreasonably Impair the Access of National Banks to the Federal Courts.

If the Fourth Circuit decision is not reversed, national banks will be substantially deprived of equal access to the federal courts, an outcome at odds with both long-standing congressional policy favoring independence of national banks from state regulation, and more recent congressional policy favoring the growth of interstate operations by national banks.

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[20] The first sentence of Section 1348 provides that federal "district courts shall have original jurisdiction of" (i) cases "commenced by the United States, or by direction of any officer thereof, against any national banking association," (ii) "any civil action to wind up the affairs of any such association," and (iii) certain actions by a national bank "to enjoin the Comptroller of the Currency, or any receiver acting under his direction." 28 U.S.C. § 1348.

Moreover, the Fourth Circuit's reliance on "physical presence" to determine citizenship for diversity purposes threatens even greater mischief than may first appear, because this approach could be expanded to apply in the numerous states where a national bank maintains a presence that does not constitute a "branch." The National Bank Act defines a "branch" as any "branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(j). This definition explicitly excludes "an automated teller machine or a remote service unit" (*id.*) and implicitly excludes most loan production offices and back-office operations, although each might be deemed to constitute a "physical presence." At a minimum, there will be considerable uncertainty and controversy. As just one example, this Court has held that a mobile armored car service can be a "branch" under the National Bank Act. *Dickinson*, 396 U.S. at 137-38. Would a national bank be "located" in every state serviced by such an armored car service? Would the answer depend upon the regularity or frequency of the service?

The interpretation of Section 1348 adopted by the Fourth Circuit – even if limited to branches as defined by the National Bank Act – threatens greatly to impair the access of national banks to the federal courts. The "physical presence" definition would not only further limit that access but be a constant source of confusion and litigation.

CONCLUSION

Under the Fourth Circuit decision, federal diversity jurisdiction for national banks would be significantly restricted, contrary to the congressional goals of "jurisdictional parity" and not placing national banks at a competitive disadvantage. The Fourth Circuit decision should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

WACHOVIA BANK, NATIONAL ASSOCIATION,
Petitioner,

v.

DANIEL G. SCHMIDT III, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF JPMORGAN CHASE BANK, N.A. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, for purposes of federal diversity jurisdiction, a national banking association is "located" in, and thus deemed to be a citizen of, every state in which the association merely maintains a branch.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae JPMorgan Chase Bank, N.A. ("Chase"), is a national bank organized under the laws of the United States, and currently it has branch operations in 18 States. It therefore has a substantial interest in the issue presented here, because this Court's interpretation of 28 U.S.C. § 1348 will determine Chase's citizenship for diversity purposes—and therefore its access to the federal courts—in cases around the country. Indeed, Chase prevailed on the very issue presented here in a recent Fifth Circuit decision that formed part of the circuit split identified in Wachovia's petition. See *Horton* v. *Bank One, N.A.*, 387 F.3d 426 (5th Cir. 2004).[2] A petition for certiorari in *Horton* is currently pending before this Court, apparently awaiting the outcome of this case. See 73 U.S.L.W. 3463 (U.S. Jan. 3, 2005) (No. 04-989). The holding of the Fourth Circuit in this case purports to overturn an understanding of national bank citizenship that is more than 100 years old, and thereby to deprive national banks of access to federal courts in situations where the purpose of diversity jurisdiction to prevent geographic bias would clearly be served. Chase's experience and perspective should assist the Court in interpreting 28 U.S.C. § 1348.

BACKGROUND AND SUMMARY OF ARGUMENT

1. The citizenship of national banks for purposes of diversity jurisdiction is defined by 28 U.S.C. § 1348, which provides that national banks are "deemed citizens of the States in

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that counsel for *amicus* authored this brief in its entirety. No person or entity other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Letters of consent from all parties have been filed with the Clerk of the Court.

[2] The party listed in the Fifth Circuit case is Bank One, N.A. (not JPMorgan Chase Bank, N.A.), because that case was commenced prior to the merger of Bank One, N.A. into JPMorgan Chase Bank, N.A.

which they are respectively located." The beginning and end of this case is the definition of the term "located"—namely, whether a national bank is "located" for jurisdictional purposes in each and every State where it has a branch. If the Fifth Circuit's interpretation in *Bank One* is correct (as Chase believes), then federal diversity jurisdiction remains generally available to national banks, just as it is for state banks and for corporations. If the Fourth Circuit's interpretation in this case is adopted, and a bank is "located" for jurisdictional purposes "wherever it has physical presence," then diversity is largely destroyed for national banks with multiple branches (and possibly even ATMs and processing centers as well, under the Fourth Circuit's broad language). See *Wachovia Bank, N.A.* v. *Schmidt*, 388 F.3d 414, 417 (4th Cir. 2004). Accordingly, the federal courts would be substantially shuttered to national banks, a result that would stand in stark contrast to the situation confronting state banks and corporations.

There are multiple tools for analyzing the meaning of the term "located" used in § 1348—historical analysis, legislative history, statutory purpose—and Wachovia's principal brief demonstrates that using each of those modes of analysis supports the conclusion that the term "located" in § 1348 does not refer to the places where national banks merely have branch offices. This brief, however, focuses on an important aspect of this case that has been largely neglected in the lower courts—*viz.*, a close textual analysis of the term "located." This oversight is curious because under the usual meaning of the term, a national bank is not "located" in every State where it has a branch, and certainly does not *unambiguously* have this meaning, as the court below mistakenly held.

2. The cardinal rule of statutory interpretation is that words must be given their ordinary and natural meaning. Here, the text at issue is the word "located," and the most common meaning of that term is a limiting one; contrary to what the Fourth Circuit held, it cannot comprise numerous and scattered places in this context. This meaning is set forth in dictionaries that are contemporaneous with the original, 19th-century enactment of § 1348's precursor. It likewise finds support in dictionaries that are contemporaneous with the enactment of § 1348, as well as current dictionaries. And, in every era, both legal and non-legal dictionaries point to this same result.

This understanding of the term "located" is confirmed by common usage, and by similar uses of the term in other statutes. In common parlance, a complex corporate entity—whether a national bank, state bank, or a corporation—is not understood to be "located" at every place where it happens to ca..y on its business. The Fourth Circuit's contrary conclusion confuses the subsidiary parts of a corporate enterprise with the entity writ large. To be sure, it makes sense to talk about where a branch "is located," but that is quite beside the point here—general references to the location of the larger entity mean something else.

3. These modes of textual analysis are confirmed by one critical aspect of the history of § 1348 and its predecessor provisions concerning national bank jurisdiction. From the inception of national banks until relatively recently, national banks could *only* have branches in a single State. Thus, when the jurisdictional term "located" first was enacted, there was *no* interstate branch banking for national banks.[3] Accordingly, for more than 100 years, in this context the term "located" could not possibly have referred to myriad locations. What is more, over the course of numerous amendments and recodifications of the federal banking laws, Congress never stated any intent to alter the historical meaning of this term.

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[3] Under rare circumstances, a national bank that converted its charter from a state bank was permitted to operate interstate branches. *See* Wachovia Br. at 28 n.14 (discussing this rarely invoked grandfathering provision).

ARGUMENT

I. THE TERM "LOCATED" IN § 1348 DOES NOT REFER TO EVERY STATE WHERE A NATIONAL BANK MAINTAINS A BRANCH.

Statutory interpretation begins with the text of the statute. *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). When, as here, a term has no statutory definition, its "'ordinary or natural meaning'" governs. *Leocal* v. *Ashcroft*, 125 S. Ct. 377, 382 (2005); *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994). The most common understanding of the term "located" does not, as the Fourth Circuit erroneously held, admit of a multiplicity of locations. This is all the more so when one refers to the whole of a corporate entity with many branches—although its *branches* may be "located" around the nation or the world, the *corporate entity* is not. This usage of the term "located" applies equally to national banks, as evidenced by numerous dictionary definitions, common usage and similar statutes.

Obviously, statutory interpretation is a holistic enterprise, and undue focus on dictionary definitions can be methodologically flawed. That general rule certainly holds true here, where this Court and the Office of the Comptroller of the Currency both have recognized that the term "located" as used in the banking statutes is context-dependent. See *Citizens & Southern Nat'l Bank* v. *Bougas*, 434 U.S. 35, 43-44 (1977) (interpreting "located" in 12 U.S.C. § 94 in light of venue-specific concerns); *Marquette Nat'l Bank of Minneapolis* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 309-13 & n.21 (1978) (interpreting "located" in 12 U.S.C. § 85); 12 U.S.C. § 1811 note (governing the interpretation of 12 U.S.C. § 85, which contains the term "located").[4] Chase understands

[4] *See also* H.R. Conf. Rep. No. 103-651, at 63 (1994) (discussing § 1811); 140 Cong. Rec. S12788, 12790 (daily ed. Sept. 13, 1994) (statement of Sen. Roth) (same); *see also* Office of the Comptroller of the Currency, Interpretive Letter No. 782, at 4-6 (June 1997) (interpreting 12 U.S.C. § 85), *available at* http://www.occ.treas.gov/interp/jun97/int782.pdf

and agrees with this. But Chase disagrees with a fundamental point in the analysis of the court below—the notion that reliance on dictionary definitions unambiguously supports reading § 1348 to preclude diversity jurisdiction if a national bank maintains a branch in the same State as another party. That premise is flatly contradicted by a more rigorous review of those sources. Accordingly, Chase's attention to this particular problem of statutory construction is intended simply to complement Wachovia's broader themes. Chase embraces those arguments concerning structure, history and purpose, but there is no point in parroting arguments effectively and fully made elsewhere.

A. Dictionaries Support This Conclusion.

In the absence of a statutory definition—and there is none here—this Court looks to dictionary definitions to interpret a statutory term. *E.g.*, *MCI Telecomms. Corp.* v. *AT&T Co.*, 512 U.S. 218, 225 (1994); see 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 47:07, at 56 (6th ed. Supp. 2005); 2A *id.* § 47:27, at 338 (6th ed. 2000). Dictionaries are virtually unanimous in defining the term "located" (as well as the related terms "locate" and "location") in terms of a limited number of places. This unanimity of definition extends to legal and lay dictionaries, both modern and those contemporary with the enactment of § 1348 and each of its predecessors. This understanding defeats the Fourth Circuit's "multiplicity of locations" rationale.

The time of a statute's enactment is "the most relevant time for determining a statutory term's meaning," *MCI*, 512 U.S. at 228; *Perrin* v. *United States*, 444 U.S. 37, 42-45 (1979), and so we begin with dictionaries from the late 19th century, when the term "located" appeared in a precursor statute to § 1348. See Act of Mar. 3, 1887, ch. 373, § 4, 24 Stat. 552, 554-55. The 1864 edition of Webster's Dictionary, for in-

stance, defines the term "locate" as "To place; to set in a particular spot or position." *Dictionary of the English Language* 783 (1864). This definition—like many of the definitions in subsequent dictionaries—is notable for its designation of a "particular" place. There is no hint in this definition that, as the Fourth Circuit held, a single entity could be located in numerous and widespread places. Likewise, the 1860 dictionary by Joseph Emerson Worcester—Noah Webster's chief competitor—defined the term "locate" in limited fashion: "To designate and determine *the* place of." *Dictionary of the English Language* 850 (1860) (emphasis added). Dictionaries from the 1880s employed the same formulation. See *Webster's International Dictionary of the English Language* 864 (1890) ("[t]o place; to set in a particular spot or position"); *Black's Law Dictionary* 730 (1891) ("To ascertain and fix the position of something, the place of which was before uncertain or not manifest; as to locate the calls in a deed.").

These definitions' use of the term "particular"—which recurs in the later dictionary definitions cited *infra*—is a complete answer to the Fourth Circuit's mistaken conclusion that the statutory text unambiguously means that a national bank is located "wherever it has physical presence." *Wachovia*, 388 F.3d at 417. That court reasoned that an entity may have any number of "'particular or specific location[s],'" *id.* at 417-18—an oxymoron that is flatly contrary to the meaning of the word "particular." Compare *id.* (reasoning that definitions employing the term "particular" "do not include any requirement that the 'particular or specific location' be *unique* or exclude *other* distinct locations"), with *Webster's Third New International Dictionary* 1646 (1993) (defining "particular" as "of, relating to, or being a single definite person or thing as distinguished from some or all others.").

These historical definitions are particularly important because when the National Bank Act was enacted, a national bank could not engage in branch banking. See *infra* Part II. In short, the term "located" in historical context could not

have embraced a multitude of locales. That historical meaning is mirrored and reinforced by dictionaries that were contemporaneous with the 1911 and 1927 banking enactments, and which likewise defined the term "locate" with regard to particularity of place. See *Black's Law Dictionary* 735 (2d ed. 1910) ("To ascertain and fix the position of something, the place of which was before uncertain or not manifest; as to locate the calls in a deed."); see also *Black's Law Dictionary* 1127 (3d ed. 1933) (same); *Webster's New International Dictionary* 1449 (2d ed. 1934) ("[t]o set or establish in a particular spot or position").

The next definitional milestone comes in the middle of the 20th century. Section 1348 was codified in 1948, and during that precise period, the Fourth Edition of *Black's Law Dictionary* defined the term "located" with explicit reference to banks, in a fashion that is directly applicable here: "A bank is 'located' in the place specified in its organization certificate." *Black's Law Dictionary* 1088 (4th ed. 1951). This same definition was carried over to the revised Fourth Edition, published in 1968. See *Black's Law Dictionary* 1088 (rev. 4th ed. 1968). Indeed, this was not just *a* definition of the term; it was *the principal* definition.

The court below ignored these definitions of "located." Indeed, its methodology in reviewing dictionaries seems to have been quite selective. Although it employed the Revised Fourth Edition of *Black's Law Dictionary*, the Fourth Circuit instead selected a less favorable definition from that same edition. *Wachovia*, 388 F.3d at 417. Similarly, in looking to the Sixth Edition of *Black's Law Dictionary*, it ignored the definitions conveying particularity that have been a mainstay of editions past and since, see *Black's Law Dictionary* 939 (6th ed. 1990) (defining "locate" as "To ascertain and fix the position of something, the place of which was before uncertain or not manifest, as to locate the calls in a deed."); *Black's Law Dictionary* 847 (5th ed. 1979) (same), and instead selected an outlier definition that appeared in *Black's* only for a

short period, *see Wachovia*, 388 F.3d at 417. This Court has previously criticized selective reliance upon an "out-of-step dictionary" definition. *MCI*, 512 U.S. at 227.

Finally, even if these historical definitions were insufficient to demonstrate the longstanding meaning of the term "located" as not being linked to a multiplicity of locales, modern dictionaries confirm this meaning. *Webster's Third New International Dictionary*, for example, defines "locate" as "to set or establish in a particular spot or position." *Id.* at 1327 (1993). See also, *e.g.*, *American Heritage Dictionary* 496 (4th ed. 2001) ("[t]o determine *the* position of" or "[t]o place; situate" (emphasis added)); 8 *Oxford English Dictionary* 1081 (2d ed. 1989) ("To appoint the place or situation of (the lands referred to in a grant); to fix the site of (a building, etc.)"). Current legal dictionaries define "location" likewise. See *Black's Law Dictionary* 958 (8th ed. 2004) ("The specific place or position of a person or thing."); *Black's Law Dictionary* 951 (7th ed. 1999) (same).

This evidence is overwhelming. Historical dictionaries contemporaneous with each significant jurisdictional enactment, as well as the best lexicographical scholarship to date, all agree that the ordinary meaning of "located" does not embrace myriad locations. The suggestion by the court below that this term unambiguously means the opposite should be rejected.

B. The Common Usage Of "Located" Supports This Conclusion.

"'Ordinary'" and "'natural'" usage, *Leocal*, 125 S. Ct. at 382; *Meyer*, 510 U.S. at 476, confirms what the dictionary definitions set forth above show: In standard American English, an entity such as a national bank ordinarily is not understood to be "located" in numerous places (unless, of course, a specific context demands otherwise, see *supra* at 4-5 & n.4). Take, for instance, the example of a corporation. If asked "Where is Ford located?," the common answer would be

"Michigan," not every place that happens to be home to a Ford dealership. Other similar entities are likewise understood to be "located" at their headquarters sites. The Seventh Circuit recognized precisely this usage, in a thoughtful explanation that bears repeating in full:

> In the context of jurisdiction, use of the word 'located' in discussing a corporation likely refers to the state where the principal place of business is located or perhaps where the company is incorporated. That is, if in the course of discussing jurisdictional motions a federal judge asks a lawyer representing a corporation 'where is your client located?,' the judge likely expects to hear the lawyer respond by naming the state containing the corporation's principal place of business and probably the state of incorporation as well. The judge does not expect for the lawyer to rattle off every state where the corporation has facilities or a presence.

Firstar Bank, N.A. v. *Faul*, 253 F.3d 982, 987 (7th Cir. 2001). And, that court went on to recognize, "a national bank appears to be analogous in most respects to a corporation" for these purposes. *Id.* at 988.

It is critical in this context to distinguish between the location of the larger corporate entity (Ford or Wachovia) and the location of a sub-unit of the larger entity (a Ford dealership, or a Wachovia bank branch). Of course, it is not unreasonable to ask where a particular sub-unit, such as a bank branch, is "located." But § 1348 does not concern itself with sub-units of national banks. Rather, it unquestionably refers to the location of the national bank itself. The statute refers to "***national banking associations***," and it is these banking associations considered "respectively" in their entirety—and ***not their individual branches***—that are "deemed citizens of the States in which they are respectively located." 28 U.S.C. § 1348 (emphasis added).

The court below failed to recognize this distinction between the location of the larger entity and the location of the entity's subsidiary units. In the course of concluding that the word "located" encompasses bank branches, that court reasoned that "the word 'located' unambiguously includes branch offices, because branch offices plainly have a 'specific place or position,' are clearly located in a 'particular spot or position,' and are certainly 'fixed or established in a site or place.'" *Wachovia*, 388 F.3d at 418 (quoting dictionary definitions of the terms "locate" and "location"). This is the right answer to the wrong question. *Of course* a branch office can be "located" somewhere, and *of course* a branch office has a "'specific place or position'" and a "'particular spot or position.'" But, this is quite beside the point, because § 1348 does not concern itself with where branch offices are located; it defines where the larger entity—the national banking association—is located.[5]

* * * *

The meaning of "located" in the context of § 1348 plainly does not embrace every State where a branch operates. The Fourth Circuit's contrary conclusion fails to do business with the array of dictionary definitions of "located" and with the common usage of the term. In sum, the most common usage

[5] The Fourth Circuit's other primary counterexample likewise provides no support for the notion that a single corporate entity is "located" in numerous places. The court reasoned that "it would be odd to restrict ["locate"]'s application to a *unique* site .... A tract of land that stretches across the border of North and South Carolina is 'located' in *both* states, not just North Carolina." 388 F.3d at 418. This hypothetical presupposes a single tract of land in a single unified place, and therefore sheds no light on the very different question of a corporate entity and its subparts. The fact that the hypothetical "tract of land" straddles a state line does not mean that it has multiple locations—it simply means that the single location happens to cross a state border. *Cf.* 28 U.S.C. §§ 83(b)(1), 124(c)(5) (characterizing the Texarkana courthouse as being "located astride the State line between Texas and Arkansas.")

of "located" does not, as the court below held, refer to numerous and far-flung places.

II. AT THE TIME OF ITS ENACTMENT AND FOR MORE THAN A CENTURY THEREAFTER, THE TERM "LOCATED" HAS NOT, IN THE CONTEXT OF JURISDICTION, REFERRED TO NUMEROUS PLACES.

The interpretation of the term "located" set forth above is confirmed by one crucial aspect of the history of national banking: From the first national banking law until relatively recently, national banks were not permitted to engage in interstate branch banking, and hence a national bank could not be "located" in multiple States. That is to say, for over 100 years, the term "located" in the jurisdictional context could only have meant that a national bank was a citizen of but one State for purposes of diversity jurisdiction. This historical fact is of surpassing importance in interpreting the statute, for it demonstrates beyond question that, at the time of its original enactment, the statutory term's meaning could not have been the one adopted by the court below. This interpretation is confirmed by the fact that Congress repeatedly reenacted the same statutory term, with no indication that it was changing the statute's meaning. After such a lengthy period of established meaning—confirmed by judicial interpretation—Congress would have to act clearly if it intended fundamentally to alter the meaning of the well-defined term. It did not.

1. The term "located" appears in the National Banking Act in the jurisdictional context in 1887, in language that closely resembles § 1348:

> That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively *located*; and in such cases the circuit and district courts shall not have jurisdiction

other than such as they would have in cases between individual citizens of the same State.

Act of Mar. 3, 1887, ch. 373, § 4, 24 Stat. at 554-55 (emphasis added). The 1887 statute was "similar in its terms" to an 1882 statute, see *Ex parte Jones*, 164 U.S. 691, 693 (1897), in which Congress "put national banks on the same footing as the banks of the state where they [a]re located," *Leather Mfrs.' Nat'l Bank* v. *Cooper*, 120 U.S. 778, 780 (1887); see Act of July 12, 1882, ch. 290, § 4, 22 Stat. 162, 163.* Specifically, where previously there had been general federal question jurisdiction over national banks because they were organized under federal law, now there would be diversity jurisdiction, just as there was for corporations and individuals. See *Petri* v. *Commercial Nat'l Bank of Chi.*, 142 U.S. 644, 650-51 (1892).

At the time the 1887 statute was enacted, it was plain that a bank was "located" in a single place because at that time, "[n]ational banks were required to operate out of a single office; they were not allowed to branch." Mark D. Rollinger, *Interstate Banking and Branching Under the Riegle-Neal Act of 1994*, 33 Harv. J. on Legis. 183, 189 (1996); see also *Bougas*, 434 U.S. 35 at 43 (explaining that national banks could not even engage in *intra*state branch banking until 1927). In short, there can have been no doubt in 1887 that a national bank was "located" in the State in which it was organized and carried on its business.

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* The text of the 1882 Act provided as follows:

> [T]he jurisdiction for suits hereafter brought by or against any association established under any law providing for national-banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business when such suits may be begun . . . .

22 Stat. at 163.

That indisputable meaning is, of course, an essential and illuminating guide to the meaning of the current statute. "It is established practice in American legal processes to consider relevant information concerning the historical background of enactment in making decisions about how a statute is to be construed ...." 2A *Sutherland on Statutes and Statutory Construction* § 48:03, at 422 (6th ed. 2000); see also *id.* at 427-28 ("The legal history of a statute, including prior statutes on the same subject, is a valuable guide for determining what object an act is supposed to achieve."). Against the backdrop of that unambiguous and settled meaning, there is a strong presumption that the term has not been fundamentally altered unless Congress expressly and directly does so. See *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). Congress took no such action.

2. On the contrary, at no point in the intervening years has Congress expressed its intent to expand the term "located" (in the context of diversity jurisdiction) to cover all branch offices. Congress routinely revisits jurisdictional issues, including this one. It has had ample opportunity to redefine the term "located" in the context of national bank jurisdiction, and consistently has declined to do so. Notable enactments concerning federal jurisdiction over national banks occurred in 1927, 1933, 1948 and 1994. In each instance, it remained clear that the term "located" does not refer to branches in different States, a fact that is highly significant. See 2B *Sutherland on Statutes and Statutory Construction* § 49:03, at 14-15 (6th ed. 2000) ("Long-continued contemporaneous and practical interpretation of a statute .... constitutes an invaluable aid in determining the meaning of a doubtful statute."). Over and again, courts confirmed this meaning, and these judicial interpretations were ratified by subsequent congressional enact-

ments. See *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); *Cottage Sav. Ass'n* v. *Commissioner*, 499 U.S. 554, 562 (1991) (same).

The codification of 1911, for instance, employed language nearly identical to the 1887 Act, and did not alter the use of "located" for purposes of diversity jurisdiction.[7] There is no hint that Congress intended to change the settled understanding of the term "located"; on the contrary, national banks still had no authority to operate bank branches, see *First Nat'l Bank in St. Louis* v. *Missouri*, 263 U.S. 640, 658 (1924), and it therefore remained clear that a national bank was "a citizen of *the* State in which it was located," *Continental Nat'l Bank of Memphis* v. *Buford*, 191 U.S. 119, 124 (1903) (emphasis added). The McFadden Act, passed in 1927, for the first time authorized national banks to operate branch offices (although only within their city of residence and to the extent authorized by state law), but it likewise took no steps to alter the jurisdictional understanding of where a national bank is "located." Act of Feb. 25, 1927, ch. 191 § 7, 44 Stat. 1224, 1228-29. Similarly, the Glass-Steagall Act in 1933 permitted national banks to operate branches throughout a State, but only within that single State (and, again, to the extent authorized by state law). Act of June 16, 1933, ch. 89, § 23, 48 Stat. 162, 189-90; see H. Rodgin Cohen, *Interstate Banking: Myth and Reality*, 18 Loy. L.A. L. Rev. 965, 967 (1985) (describing the Act). There was no indication that a national bank was "located" for jurisdictional purposes everywhere it had a branch,

[7] "[A]ll national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located." Act of Mar. 3, 1911, ch. 231, § 24(16), 36 Stat. 1087, 1093.

and Congress's repeated amendments to these jurisdictional provisions did nothing to change that well established meaning. See *Cope* v. *Anderson*, 331 U.S. 461, 467 (1947) ("For jurisdictional purposes, a national bank is a 'citizen' of *the* state in which it is established or located, and in that district alone can it be sued.") (emphasis added; citation omitted).

Indeed, down to the present, Congress has given no indication that it intends to disturb the settled jurisdictional understanding of the term "located" that has prevailed for over a century. Congress made no such suggestion when it enacted the current version of the jurisdictional statute, § 1348, in 1948. Nor did Congress so suggest in 1994, when it first permitted national banks to engage in widespread interstate branch banking. See Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338. This, of course, would have been the obvious opportunity for Congress to indicate its intent to abrogate the longstanding meaning of the term "located" in the jurisdictional context, were that Congress's intent, because the Riegle-Neal Act represented the first time that national banks could widely be characterized as "located" in more than one State. (Indeed, Congress did address the meaning of that term at that time in other contexts. See *supra* at 4-5 & n.4.) But by 1994, the jurisdictional meaning of "located" had long been fixed, and Congress made no effort to change that meaning. Accordingly, the longstanding historical meaning of the term "located"—which also is the best interpretation of that text—remains in place. *American Trucking Ass'ns*, 531 U.S. at 468; *Brown & Williamson*, 529 U.S. at 160; *Cottage Sav. Ass'n*, 499 U.S. at 562.

3. This Court's decision in *Bougas*, and Congress's reaction to it, confirm that the term "located" in § 1348 does not refer to every site where a national bank has a branch. In *Bougas*, this Court interpreted the term "located" in the national bank act's venue provision as permitting suits by and against national banks in state courts wherever the bank has a

branch office. 434 U.S. at 44; see 12 U.S.C. § 94 (1976).[8] But, in order to reach this conclusion, *Bougas* employed a purposive and context-specific analysis of § 94. A similar analysis here points to the opposite result with regard to § 1348: Whereas venue is concerned with convenience to litigants and therefore may be applied broadly to branch locations, diversity jurisdiction focuses upon prejudice against out-of-state defendants. See Wachovia Br. at 36-38. In short, it is clear in context that venue bears an expansive definition, just as it plainly is, was, and has been Congress's intent that the citizenship of national banks be more narrowly defined.

The venue tail of the term "locate" should not wag the "dog" of that term—its dominant meaning is more particular than the court of appeals understood it. The ordinary use of the term "located" should be applied to § 1348 and thus neither Wachovia nor Chase is "located" in every State where it has a branch office.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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[8] At the time *Bougas* was decided, 12 U.S.C. § 94 provided that:

> Actions and proceedings against any association under the chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

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WACHOVIA BANK, NATIONAL ASSOCIATION,
PETITIONER

v.

DANIEL G. SCHMIDT, III, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Under 28 U.S.C. 1348, "national banking associations" are "deemed citizens of the States in which they are respectively located" for purposes of federal diversity jurisdiction. The question presented is whether a national banking association is "located" in, and hence a "citizen" of, every State in which it maintains a branch office or other form of physical presence.

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In the Supreme Court of the United States

No. 04-1186

WACHOVIA BANK, NATIONAL ASSOCIATION, PETITIONER

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether, for purposes of federal diversity jurisdiction, a national banking association is "located" in, and therefore a "citizen" of, every State in which it maintains a branch of office or other form of physical presence. 28 U.S.C. 1348. The Office of the Comptroller of the Currency (OCC), a bureau within the Department of the Treasury, is responsible for administering the National Bank Act, 12 U.S.C. 1 *et seq.* As the agency charged with supervision of national banks and with protecting the safety and soundness of the national banking system, the OCC has an interest in the extent to which national banks have access to federal diversity jurisdiction. The OCC has issued an interpretive letter treating the location of the designated main office of a national banking association as generally determinative of citizenship. OCC Interp. Ltr. 952 (Oct. 23, 2002) (*available at* <http://www.occ.treas.gov/interp/feb03/int952.

pdf>). In addition, the OCC has filed a number of amicus briefs addressing the issue including one filed in support of the petition for en banc hearing below. See *Horton* v. *Bank One, N.A.*, 387 F.3d 426 (5th Cir. 2004), petition for cert. pending, No. 04-989 (filed Jan. 3, 2005); *Firstar Bank, N.A.* v. *Faul*, 253 F.3d 982 (7th Cir. 2001).

STATUTORY PROVISIONS INVOLVED

The provisions of 28 U.S.C. 1348 are set forth in an appendix to this brief. App., *infra*, 1a.

STATEMENT

1. a. National banking associations are federally chartered corporations authorized to "carry on the business of banking." 12 U.S.C. 24 (Seventh). Congress first provided for the formation of national banking associations in 1863. Act of Feb. 25, 1863, ch. 58, 12 Stat. 665 (1863 Act). Under the 1863 law, the persons forming a national banking association were required to "make a certificate" specifying, *inter alia*, "[t]he place where its operations of discount and deposit[] are to be carried on, designating the State, Territory, or district, and also the particular city, town, or village." 1863 Act § 6 (Second), 12 Stat. 666. The current provisions of the National Bank Act, 12 U.S.C. 1 *et seq.*, likewise prescribe that the persons forming a national banking association must "make an organization certificate" identifying, *inter alia*, "[t]he place where its operations of discount and deposit are to be carried on, designating the State, Territory, or District, and the particular county and city, town, or village." 12 U.S.C. 22 (Second). Upon filing its organization certificate and its articles of association, see 12 U.S.C. 21, 21a, a national banking association becomes "a body corporate," 12 U.S.C. 24.

Under the original national banking provisions enacted in 1863, a national bank was permitted to conduct its business only at the single place of business designated in its organization certificate, "and not elsewhere." 1863 Act § 11, 12 Stat. 668. Congress soon permitted a national bank to relocate its designated "place where its operations of discount and deposit are to be carried on," if the OCC approved the relocation and the new site remained in the same State and within 30 miles. Act of May 1, 1886, ch. 73, § 2, 24 Stat. 18. But while a bank therefore could relocate its designated place of business—*i.e.*, its designated "main office," 12 U.S.C. 30(b)—it generally was barred from opening any branch offices. See *First Nat'l Bank* v. *Missouri*, 263 U.S. 640, 656-658 (1924). In 1865, Congress enacted an exception permitting a state bank that converted into a national bank to retain its pre-existing branches. Act of Mar. 3, 1865, ch. 78, § 7, 13 Stat. 484. But branching by state banks remained limited, such that, "at the turn of the century, there were very few branch banks in the country." *First Nat'l Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 257 (1966).

b. In 1927, in response to increased branching by state banks, Congress first gave national banks general authority to establish branch offices. McFadden Act, ch. 191, § 7, 44 Stat. 1228; see *Walker Bank*, 385 U.S. at 257-258. Even then, a national bank was permitted to establish a branch only within the same municipality as its designated main office, and only to the extent that the State in which the bank was located would permit a state bank to operate a branch in like circumstances. § 7, 44 Stat. 1228. In 1933, Congress authorized a national bank to branch throughout its home State, but again, only to the extent that state banks possessed such authority under state law. Banking Act of 1933, ch. 89, § 23, 48 Stat. 189-190. Through those various measures, "Congress intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned." *Walker Bank*, 385 U.S. at 261.

Although Congress in 1933 permitted national banks to establish branch offices within the same State, there remained no allowance for interstate branching. See S. Rep.

No. 240, 103d Cong., 2d Sess. 5 (1994). Over 60 years later, in 1994, Congress first gave national banks general authority to establish branch offices across state lines. See Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338. The authority to establish an out-of-state branch arises under specified conditions, such as if the branch results from an interstate merger transaction. 12 U.S.C. 36(d). The 1994 authorization of interstate branching applies not only to national banking associations, but also to state banks insured by the FDIC. See 12 U.S.C. 1831u(a)(1).

c. When a national banking association is initially formed, the "place where its operations of discount and deposit are * * * carried on," 12 U.S.C. 22 (Second), must be designated in both the organization certificate, see *ibid.*, and the articles of association, see 12 U.S.C. 21; OCC, *Instructions for Articles of Association* (*available at* <http://www.occ.treas.gov/corpbook/forms/InstructionsArticlesofAssoc.doc>). The certificate is essentially a fixed historic document used in the organizing process, whereas the articles reflect current conditions. Accordingly, the National Bank Act provides for amendment of the articles of association, 12 U.S.C. 21a, but not the organization certificate.

When a national bank wishes to change the "city, town, or village" of its designated "place where its operations of discount and deposit are to be carried on," 12 U.S.C. 22 (Second), it must amend its articles of association, 12 C.F.R. 5.40(d)(2)(ii). The new location becomes the bank's newly designated "main office" under 12 U.S.C. 30(b). When a bank relocates its designated main office under 12 U.S.C. 30(b), the original location designated in the organization certificate becomes obsolete. OCC therefore has determined in an interpretive letter that the location of the designated main office, rather than the location originally designated in the organization certificate, is generally controlling for purposes of determining the bank's corporate status under the banking laws, see, *e.g.*, 12 U.S.C. 36(g)(3)(B) (defining bank's "home State" as State in which main office is found), and for determining the bank's citizenship. OCC Interp. Ltr. 952 (Oct. 23, 2002) (*available at* <http://www.occ.treas.gov/interp/feb03/int952.pdf>).[1]

2. Petitioner Wachovia Bank is a national banking association with its designated main office (and principal place of business) in Charlotte, North Carolina. Wachovia's organization certificate identified its original "place" for conducting "its operations of discount and deposit," 12 U.S.C. 22 (Second), as Salem, New Jersey. Wachovia operates branch offices in many States, including South Carolina. Pet. App. 2a.

a. On April 10, 2003, respondents, one of whom is a citizen of South Carolina, filed an action for fraud in South Carolina state court against Wachovia and other defendants. On June 18, 2003, Wachovia filed a petition in the United States District Court for the District of South Carolina, seeking an order compelling arbitration of respondents' state law claims. The sole basis invoked for federal jurisdiction was the diversity statute, 28 U.S.C. 1332. The district court, without addressing its subject matter jurisdiction, ruled against Wachovia on the merits of the petition to compel arbitration. Pet. App. 2a, 47a-56a.

b. A divided panel of the court of appeals vacated and remanded, holding that the district court was without diversity jurisdiction over the action. Pet. App. 1a-46a. The majority observed that Wachovia's citizenship for diversity

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[1] State chartered corporations are subject to parallel requirements concerning initial designation and subsequent modification of the site of the main office, except that the main office is generally referred to as the "principal office" (or "registered office"). See 18 C.J.S. *Corporations* §§ 107(b)-(c), 108 (1990); 14 C.J. *Corporations* §§ 417, 420 (1919); 1A William M. Fletcher, *Cyclopedia Corporations* § 140 (2002); 8 *Cyclopedia Corporations*, *supra*, § 4046 (2001); 9 *Cyclopedia Corporations*, *supra*, § 4373 (1999).

purposes is controlled by 28 U.S.C. 1348, which provides that "national banking associations" are "deemed citizens of the States in which they are respectively located." Pet. App. 3a (emphasis omitted). In the majority's view, Wachovia is "located" in, and therefore a "citizen" of, every State in which it maintains a branch office.

The majority reasoned that the "ordinary meaning of 'located' suggests that a national bank is 'located' wherever it has physical presence." Pet. App. 4a. The majority considered Section 1348 to be unambiguous on that score even though the three courts of appeals that previously addressed the issue had reached a contrary interpretation of the statute. *Id.* at 3a-7a; see *Horton* v. *Bank One, N.A.*, 387 F.3d 426 (5th Cir. 2004); *Firstar Bank, N.A.* v. *Faul*, 253 F.3d 982 (7th Cir. 2001); *American Sur. Co.* v. *Bank of Cal.*, 133 F.2d 160 (9th Cir. 1943). Because the majority's reading of Section 1348 rendered Wachovia a citizen of South Carolina based on the presence of Wachovia branches in that State, and because respondents also are citizens of South Carolina, the majority held that complete diversity was lacking. Pet. App. 32a.

Judge King dissented. Pet. App. 33a-46a. In his view, the term "located" in Section 1348 is ambiguous, and its meaning in context is informed by Congress's consistent intention in Section 1348's statutory precursors "to provide national banks with the same access to federal courts as that accorded other banks and corporations." *Id.* at 33a. Judge King concluded that a national banking association is a citizen of the State in which its principal office is located. *Id.* at 34a.

SUMMARY OF ARGUMENT

For purposes of Section 1348, a national banking association is not "located" in every State in which it maintains a branch office. It is undisputed that the term "located" has no fixed meaning throughout the National Bank Act. There is thus no basis for assuming that the term "located" in Section

1348 necessarily refers to *every* place that a national banking association may be physically found. Under some provisions of the banking laws, a national banking association is "located" only at the site of its designated main office rather than wherever it maintains a branch office. For instance, under a provision requiring rescheduling of the annual shareholders' meeting in the event that the original date conflicts with "a legal holiday in the State in which the bank is located," 12 U.S.C. 75, the bank is considered to be "located" only in the State in which its main office is found, and not in every State in which it maintains a branch.

The terms, context, and purpose of Section 1348 demonstrate that the term "located" in that provision similarly does not refer to every State in which the bank maintains a branch office or other form of physical presence. The explicit purpose of Section 1348 is to determine a national bank's *citizenship* for purposes of diversity jurisdiction. That purpose is incompatible with the court of appeals' interpretation of the provision.

An individual is a citizen of only one State for purposes of diversity jurisdiction, and does not become a citizen of other States by maintaining a residence or other form of physical presence there. The same rule holds with respect to corporations, including banking entities not specifically addressed by Section 1348. The longstanding rule under this Court's decisions is that a corporation is a citizen of the State of incorporation, and is not a citizen of every State in which it may conduct business or maintain a physical presence. That rule was firmly established when Congress introduced the word "located" in Section 1348's predecessor in 1887. Congress gave no indication that Section 1348 or its precursors were intended to break from the established principle that corporations are not citizens of every State in which they conduct business. To the contrary, when Congress added the word "located" in Section 1348's predecessor provision,

the banking laws already contained provisions in which the word "located" referred solely to the site of the main office.

Not only did Congress give no explicit indication of a desire to depart from the traditional rules for determining corporate citizenship, but Congress specifically intended to maintain jurisdictional parity between national banks and state banks (and other state corporations). The objective was to enable national and state banks to obtain access to federal jurisdiction on an equal basis. The court of appeals' interpretation, however, would establish an aberrant rule for national banking associations. While state banks under that approach could establish branches in additional States without jurisdictional consequence, any comparable expansion by a national bank would give rise to a contraction of diversity jurisdiction. There is no basis for concluding that Congress intended to establish any such disparity.

The court of appeals erred in relying on *Citizens & Southern National Bank* v. *Bougas*, 434 U.S. 35 (1977). *Bougas* construed a now-repealed statute governing venue in actions against national banks. While the Court concluded that the term "located" in that provision encompassed a bank's branch offices, the decision recognizes that the word "located" has no rigid meaning. The venue context at issue in *Bougas* differs markedly from Section 1348's concern with defining a national bank's citizenship for purposes of diversity jurisdiction. Moreover, the Court's reading of the venue provision had the effect of generally harmonizing the treatment of national banks for venue purposes with the treatment of state banks and corporations. The court of appeals' reading of Section 1348 has the opposite effect with respect to a national bank's citizenship.

Finally, the fact that the word "established" appears in a separate paragraph of Section 1348 does not compel reading the term "located" to have a meaning that differs from "established." The two words necessarily had the same meaning when they were originally enacted in Section 1348's statutory predecessors because national banks at that time could not establish branch offices. The two words continue to have the same meaning today in those provisions in which the word "located" refers solely to a national bank's main office. There is thus no basis for concluding that the terms must be given different meanings. They originally appeared in separate provisions enacted in separate years, and they were placed in the same code provision as part of a consolidation of the Judicial Code that explicitly did not affect their meaning.

ARGUMENT

A NATIONAL BANKING ASSOCIATION IS NOT A CITIZEN OF EVERY STATE IN WHICH IT MAINTAINS A BRANCH OFFICE

The correct interpretation of the term "located" in 28 U.S.C. 1348 is dictated by the purpose and context of the provision. Section 1348 aims to identify the citizenship of a national banking association for purposes of diversity jurisdiction. In light of the longstanding rules for determining the citizenship of a corporation and the significant disparities that would attend the court of appeals' interpretation, Section 1348 cannot be read to render a national banking association a citizen of every State in which it operates a branch office or has a physical presence.

A. In Many Contexts, A National Banking Association Is Properly Considered To Be "Located" At The Site Of Its Main Office Rather Than Wherever It Maintains A Branch

Under 28 U.S.C. 1348, "national banking associations" are "deemed citizens of the States in which they are respectively located." The court of appeals, focusing exclusively on the word "located," determined that the word "is a general term referring to physical presence in a place." Pet. App. 4a.

Based on that understanding, the court concluded that for purposes of Section 1348, "a national bank is 'located' *wherever* it has physical presence," including "wherever it operates branch offices." *Id.* at 4a-5a (emphasis added). That approach is fundamentally flawed.

1. The word "located" first appeared in Section 1348's statutory predecessor in 1887. Act of Mar. 3, 1887, ch. 373, § 4, 24 Stat. 554. The term remained in the provision when it was re-enacted as part of the consolidation of the Judicial Code in 1911, Act of Mar. 3, 1911, ch. 231, § 24 (Sixteenth), 36 Stat. 1092, and when it was again re-enacted, in its current form, as part of the re-codification of the Judicial Code in 1948, Act of June 25, 1948, ch. 646, 62 Stat. 933 (28 U.S.C. 1348). At the time of each of those enactments (and at present), the word "located" signified the particular place at which something is established or found.[2] The court of appeals espoused essentially the same understanding, with the slight adaptation that it understood "located" to carry a "physical" connotation, so as to refer to the place at which the relevant entity or object is "physically" found. Pet. App. 4a.

The central flaw in the court of appeals' analysis is in its assumption that, insofar as the word "located" refers to the place at which something is (physically) established, the term "located" in Section 1348 necessarily refers to *every* place at which a national banking association has a physical presence. See Pet. App. 4a. There is no sound basis for that inference.

To begin with, because a "national banking association" under Section 1348 is a legal abstraction rather than a tangi-

[2] See Noah Webster, *An American Dictionary of the English Language* (1828) (defining "locate" as "[t]o place; to set in a particular spot or position"); Henry C. Black, *A Dictionary of Law* 730 (1891) (defining "locate" as "[t]o ascertain and fix the position of something"); *Webster's New International Dictionary* 1266 (1917) (defining "locate" as "[t]o set or establish in a particular spot or position"); 6 *Oxford English Dictionary* 382 (1933) (defining "located" as "put in its place").

ble object, it is not self-evident that a reference to the location of the "association" concerns physical location at all. See *Trustees of Dartmouth Coll.* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."); 1 William M. Fletcher, *Cyclopedia Corporations* § 7 (1999) ("The corporation has no physical existence, but exists only in contemplation of law."). Additionally, insofar as a reference to an association's "location" pertains to its physical manifestation, it is not clear which physical manifestation is relevant. Depending on context, the physical manifestation of an association could assume a number of forms, including the tangible assets that the association controls, the officers or employees that carry out its operations, the buildings in which those individuals generally perform their functions, or the products and services offered by the association. Identifying the "location" of an association thus requires consideration of the particular context in which the term is used.

More fundamentally, to the extent the context reveals that the word "located" refers to the site of a national banking association's bricks-and-mortar offices, there is no basis for presuming that the term refers to *every* office maintained by the association rather than to the designated main office alone. A "single word cannot be read in isolation" when construing a statute, *Smith* v. *United States*, 508 U.S. 223, 233 (1993), and as this Court has recognized, "[t]here is no enduring rigidity about the word 'located,'" *Citizens & Southern Nat'l Bank* v. *Bougas*, 434 U.S. 35, 44 (1977). Whether a national banking association is considered to be "located" at the site of its main office, or instead everywhere it maintains a physical presence, depends on the reason the question is asked. Particularly because an association exists "only in contemplation of law," *Dartmouth College*, 17 U.S. (4 Wheat.) at 636, it is readily conceivable that, for certain legal

purposes, the law would consider a national banking association to be "located" only at the site of its main headquarters.[3]

2. The provisions of the National Bank Act confirm the point. The Act frequently calls for identification of the place where a national banking association is "located," and there is no fixed meaning of the term that runs consistently through the Act.

For purposes of certain provisions, as the court of appeals conceded, Pet. App. 19a-20a, the term "located" refers solely to the association's designated main office. For example, 12 U.S.C. 75 provides for rescheduling of "the regular annual meeting of the shareholders" when the appointed day "falls on a legal holiday in the State in which the bank is located." It is undisputed that the "State in which the bank is located" under that provision is the State in which the bank's main office is found; legal holidays in States with branch locations do not affect the annual meeting. Similarly, 12 U.S.C. 52 requires that a bank's capital stock certificates set forth, *inter alia*, the "location of the association." That requirement pertains solely to the site of the main office and does not compel listing the location of every other office. Likewise, 12 U.S.C. 182, which requires the board of directors to publish a notice of dissolution "for a period of two months in the city or town in which the association is located," calls for such publication only in the municipality of the main office rather than in every "city or town" in which a branch may be found. See also 12 U.S.C. 32 (providing that change of location of main office under 12 U.S.C. 30(b) does not release liabilities that "national banking association" had assumed "at its old location"); 12 U.S.C. 55 (requiring notice of sale of capital stock "in a newspaper of the city or town in which the bank is located").

[3] The reason that a legal entity such as a national banking association is required to designate a main office is generally to enable identifying the location of the entity for purposes of fixing jurisdiction, venue, tax situs, and place for service of process, and for allowing the public to inspect corporate records or contact management. See 18 C.J.S. *Corporations* § 108 (1990); 1A *Cyclopedia Corporations*, *supra*, § 140; 8 *Cyclopedia Corporations*, *supra*, § 4046.

In other provisions, conversely, the term "located" encompasses or specifically refers to a bank's branch offices. See 12 U.S.C. 36(j) (defining "branch" to include "any branch place of business located in any State"); 12 U.S.C. 85 (limiting interest rate charged by national bank to "rate allowed by the laws of the State, Territory, or District where the bank is located") (construed in OCC Interp. Ltr. 822 (Feb. 17, 1998), *available at* <http://www.occ.treas.gov/interp/mar98/int822.pdf>); 12 U.S.C. 92 (permitting national banking association to act as insurance agent in certain circumstances when association is "located and doing business in any place the population of which does not exceed five thousand inhabitants") (construed in *Independent Ins. Agents* v. *Ludwig*, 997 F.2d 958 (D.C. Cir. 1993)). For instance, in *Bougas*, *supra*, which interpreted the term "located" in a now-repealed provision governing venue in state court actions against national banks, 12 U.S.C. 94 (1976), this Court concluded that, in the context of that particular statute, the term encompassed branch offices in a different county from the county in which the main office was located. 434 U.S. at 35-38; see pp. 26-28, *infra*.

It is thus apparent that, considered in isolation, the term "located" is ambiguous as applied to a national banking association. Whether a particular provision uses the term to refer to the site of the association as a legal abstraction, to an association's designated main office, or to all of the association's offices, depends on the context and purpose of the provision at issue.

B. Because Section 1348 Aims To Identify A National Banking Association's *Citizenship*, The Term "Located" Cannot Be Construed To Encompass Every State In Which The Association Maintains A Physical Presence

The proper understanding of the term "located" in Section 1348 is substantially informed by another word in the provision, *i.e.*, "citizen," and by the provision's broader aim of identifying a national bank's *citizenship* for purposes of diversity jurisdiction. When considered in light of that objective, the term "located" in Section 1348 cannot accommodate the expansive reading ascribed to it by the court of appeals.

1. The concept of citizenship inherently connotes a distinctive association with a place. Cf. 14 C.J.S. *Citizens* § 5 (1991) ("In view of the fact that the term 'citizenship' carries with it the idea of connection or identification with the state * * *, it implies much more than residence."). The rules for identifying a person's citizenship for diversity purposes are illustrative. An individual is deemed to be a citizen of the State of his or her domicile, *e.g.*, *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 828 (1989), and it is "an historic rule of the common law" that "a person must have one domicile, and can have only one," *Texas* v. *Florida*, 306 U.S. 398, 429 (1939) (Frankfurter, J., concurring). It follows that a person can be considered a citizen of one, and only one, State. As the Court has explained, "[t]he very meaning of domicil is the technically pre-eminent headquarters [of] every person"; "[i]n its nature, *it is one*." *Williamson* v. *Osenton*, 232 U.S. 619, 625 (1914) (emphasis added); see *Sun Printing & Publ'g Ass'n* v. *Edwards*, 194 U.S. 377, 383 (1904).

An individual therefore is not a citizen of every State in which he may maintain a residence. "Citizenship and residence, as often declared by this court, are not synonymous terms," *Robertson* v. *Cease*, 97 U.S. 646, 648 (1878), and "[f]rom the earliest federal cases it has been held that mere

residence in a state does not make a person a citizen of that state," 13B Charles A. Wright et al., *Federal Practice and Procedure* § 3611, at 516 (1984); see *id.* § 3612, at 527-528 ("A person has only one domicile at a particular time, even though he may have several residences."). The traditional (and prevailing) understanding thus is that a natural person is a citizen of one State alone, not of every State in which he may maintain a residence or other form of physical presence.

2. The same principle has long obtained with respect to corporate entities such as banks. The Court initially ruled that a corporation was not itself a "citizen" of any State, and that the citizenship of the individual incorporators was thus determinative of diversity jurisdiction. *Bank of the United States* v. *Deveaux*, 9 U.S. (5 Cranch) 61 (1809). The Court later overruled that position, and held that a corporation is "capable of being treated as a citizen" for diversity jurisdiction purposes. *Louisville, Cincinnati & Charleston R.R.* v. *Letson*, 43 U.S. (2 How.) 497, 558 (1844). In particular, the Court established that a corporation is considered a citizen of the State in which it is incorporated. *Marshall* v. *Baltimore & Ohio R.R.*, 57 U.S. (16 How.) 314, 328-329 (1853). It thus became settled that, "for purposes of jurisdiction * * * a corporation [is] * * * deemed a citizen of the State creating it." *Great S. Fire Proof Hotel Co.* v. *Jones*, 177 U.S. 449, 456 (1900); see generally *Carden* v. *Arkoma Assocs.*, 494 U.S. 185, 187-189 (1990).

As with natural persons, the fact that a corporation of one State maintains a physical presence in another State does not render it a citizen of the latter State. See 13B *Federal Practice and Procedure*, *supra*, § 3623, at 597-599. Instead, by the time the word "located" first appeared in the predecessor to Section 1348 in 1887, it was established that a "corporation of one state, owning property and doing business in another state by permission of the latter, does not thereby become a citizen of this state also." *Pennsylvania R.R.* v. *St.*

Louis, Alton & Terre Haute R.R., 118 U.S. 290, 295 (1886); see *Railroad Co.* v. *Koontz*, 104 U.S. 5, 11-12 (1881) (Corporations "created by and organized under the laws of a particular State * * * [are] a citizen of that State," and "[b]y doing business away from their legal residence they do not change their citizenship, but simply extend the field of their operations."); *St. Louis & San Francisco Ry.* v. *James*, 161 U.S. 545, 562 (1896). The Court adhered to that rule even though it was already commonplace that corporations, while "[i]ncorporated under the laws of one state, * * * carry on the most extensive operations in other states." *St. Clair* v. *Cox*, 106 U.S. 350, 355 (1882). A contrary rule under which a corporation would be deemed a citizen of every State in which it transacts business would substantially curtail the availability of diversity jurisdiction (both to the corporation and to opposing parties). Cf. *Marshall*, 57 U.S. (16 How.) at 328-329 (explaining that looking through the corporate form to consider the citizenship of individual incorporators would unduly restrict the "privilege" of diversity jurisdiction).

The longstanding rule that a corporation is a citizen only of its State of incorporation governed until 1958, when Congress adjusted the rules of corporate citizenship. Under the new rule, codified at 28 U.S.C. 1332(c)(1), a corporation still is "deemed to be a citizen of any State by which it has been incorporated," but also is considered a citizen of "the State where it has its principal place of business," if different from the State of incorporation. While that provision adjusts the "long standing and thoroughly embedded" principle that a corporation "is deemed a citizen of the State in which it is incorporated," S. Rep. No. 1830, 85th Cong., 2d Sess. 4 (1958), it extends the traditional rule to encompass, at most, one additional State. It thus builds on, rather than abandons, the settled principle that a corporation is not considered a citizen of every State in which it maintains a physical presence.

3. Section 1348 must be interpreted against the background of the traditional and settled rules for determining corporate citizenship. See *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995); *Midlantic Nat'l Bank* v. *New Jersey Dep't of Environmental Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."); *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952) (noting the "presumption favoring the retention of long-established and familiar principles"). See also *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989) ("A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.").

Nothing in the terms of Section 1348 demonstrates an intent to break with the settled rule that a corporation is not a citizen of every State in which it maintains a physical presence. The word "located" establishes no such intent because it readily accommodates an interpretation confined to the State in which a national banking association's main office is found. See pp. 12-13, *supra*. In fact, by 1887, when the word "located" first appeared in the predecessor to Section 1348, the National Bank Act contained several provisions in which the word "located" referred solely to an association's main office. See, *e.g.*, Act of June 3, 1864 (1864 Act), ch. 106, § 10, 13 Stat. 102 (providing that notice of a special election of directors must be published "in the city, town, or county in which the association is located").[4]

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[4] Accord 1864 Act § 15, 13 Stat. 103-104 (requiring publication in newspaper "where the association is located" of shareholder's failure to pay requisite installment of stock); § 18, 13 Stat. 105; § 42, 13 Stat. 112. Congress similarly used the term "location" to refer solely to an association's designated main office when it provided for an association to change the designated "place where its operations of discount and operations are to be carried on. §§ 2, 4, 24 Stat. 18-19 (1886). That law explicitly de-

Nor did Congress otherwise demonstrate an intention to disavow the traditional jurisdictional rules. To the contrary, Congress made clear that national banking associations are corporations, indicating that they should be subject to the established principles for determining corporate citizenship. See 1864 Act § 8, 13 Stat. 101 (national banking association is "a body corporate."); 12 U.S.C. 24 (same). Those principles reflect the traditional understanding that, while a corporation "may by its agents transact business anywhere," the abstract entity "cannot [thereby] change its * * * citizenship" because it "can have its legal home only at the place where it is *located* by or under the authority of its charter." *Ex parte Schollenberger*, 96 U.S. 369, 377 (1877) (emphasis added). That understanding governs the citizenship of an abstract "association" under the terms of Section 1348.

C. Congress Intended To Establish Jurisdictional Parity Between National Banks And State Banks

The absence of an explicit indication that Congress intended to depart from the traditional rules governing corporate citizenship alone suffices to demonstrate that the court of appeals erred in its interpretation of Section 1348. In addition, however, there is substantial evidence that Congress affirmatively intended to establish jurisdictional parity between national banks and state banks, such that national and state banks would have access to diversity jurisdiction on equal terms.

1. Under the original national banking statutes enacted in the 1860s, any action by or against a national banking association was considered to arise under federal law by virtue of the bank's federal charter. See *Leather Mfrs. Nat'l Bank* v. *Cooper*, 120 U.S. 778, 780-781 (1887). National banking associations (and opposing parties) therefore generally enjoyed access to federal court as a matter of federal question jurisdiction. National banks, however, also retained the entitlement to bring an action on the basis of diversity of citizenship. See *Petri* v. *Commercial Nat'l Bank*, 142 U.S. 644, 649 (1892). Because federal question actions involving national banks were subject to restrictive venue provisions, see *St. Louis Nat'l Bank* v. *Allen*, 5 F. 551, 554-555 (C.C.D. Iowa 1881); *Manufacturers' Nat'l Bank* v. *Baack*, 16 F. Cas. 671, 671-672 (C.C.S.D.N.Y. 1871) (No. 9052), federal courts occasionally were called upon to determine a national banking association's citizenship for purposes of diversity jurisdiction.

The rule that emerged deemed a national bank to be a citizen of the State it identified in its organization certificate when designating the "place where its operation of discount and deposit are to be carried on." 12 U.S.C. 22 (Second). The basis for that rule was that a "national bank, being a corporation created by competent authority and located within a state * * * should be regarded, for all the purposes of the jurisdiction of the federal courts, as on an equal footing with" corporations of that State. *Allen*, 5 F. at 554; see *Baack*, 16 F. Cas. at 673-674. A national bank thus was a "citizen[] of the state as much as [the] state['s] corporations." *Allen*, 5 F. at 553; see *Baack*, 16 F. Cas. at 674.

2. In 1882, Congress revoked the provisions that gave national banks general entitlement to federal question jurisdiction. The result was to align national banks and state banks with respect to their access to federal jurisdiction:

> [T]he jurisdiction for suits hereafter brought by or against any [national banking] association established under any law providing for national-banking associations * * * *shall be the same as, and not other than*, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business * * * .

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scribed such a change as a change of the "location" of the "association." *Ibid.*

Act of July 12, 1882, ch. 290, § 4, 22 Stat. 163 (emphasis added). As this Court soon explained, the 1882 statute aimed "to put national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States." *Cooper*, 120 U.S. at 780. With respect to diversity jurisdiction in particular, the principle of jurisdictional parity codified in 1882 fortified the rule of citizenship that had emerged in the lower courts. A national bank was a citizen of the State in which it was located "on an equal footing with," *Allen*, 5 F. at 554—and subject to the same jurisdictional rules as—a corporation chartered by that State. Federal jurisdiction in actions involving national banks then would "be the same as, and not other than" jurisdiction in actions involving state banks. § 4, 22 Stat. 163.

Congress again amended the jurisdictional provisions in 1887 to read as follows:

> [A]ll national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located.

Act of Mar. 3, 1887, ch. 373, § 4, 24 Stat. 554. Soon after the 1887 enactment, this Court explained that, with respect to diversity jurisdiction, "no limitation in that regard was intended." *Petri*, 142 U.S. at 651; see *Herrmann* v. *Edwards*, 238 U.S. 107, 111 (1915) (stating that 1887 provision was "identical" to 1882 provision). The Court saw "no reason" to conclude "that Congress intended that national banks should not resort to Federal tribunals as other corporations and individual citizens might." *Petri*, 142 U.S. at 650-651. The same citizenship clause was re-enacted as part of the 1911 codification of the Judicial Code. § 24 (Sixteenth), 36 Stat. 1092. The 1887 and 1911 laws therefore continued the rule that a national bank was a citizen of the State of its designated place of business and would have access to federal jurisdiction on the same basis as a bank or other corporation of that State.[5]

As part of the 1948 re-codification of the Judicial Code, the citizenship clause enacted in 1887 and 1911 was re-enacted without material change in its present form. App., *infra*, 1a. Five years before the 1948 enactment, the Ninth Circuit had interpreted the citizenship clause in the first appellate decision addressing the precise issue presented by this case, *i.e.*, whether a national banking association is a citizen of every State in which it maintains a branch. *American Sur. Co.* v. *Bank of Cal.*, 133 F.2d 160 (1943). The out-of-state branch in that case had been retained when the Bank of California converted from a state to a national bank. See *American Sur. Co.* v. *Bank of Cal.*, 44 F. Supp. 81, 83 (D. Or. 1941). The Ninth Circuit rejected the reading espoused by the court of appeals in this case, instead holding that a national bank is not "located" in, and thus a "citizen" of, every State in which it maintains a branch. The court explained:

> If the Congress had intended to provide that a national banking institution * * * should carry the duties of citizenship in various states upon the basis of branches being established therein, it would be a noteworthy departure from the general rule [for corporate citizen-

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[5] The 1887 provision, in addition to the citizenship language quoted in the text, went on to state that, "in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State." Act of Mar. 3, 1887, ch. 373, § 4, 24 Stat. 555. This Court read that clause as limited to continuing the understanding that a national bank could obtain a federal forum only to the same extent as a state bank and had no preferred access by virtue of its federal charter alone. See *Petri*, 142 U.S. at 650-651. The Court explained that a contrary reading of the clause could have nullified the availability of diversity jurisdiction to national banks, which Congress could not have intended. *Id.* at 649-651. The clause was not carried forward in 1911.

ship], and more likely than not Congress would have plainly state[d] such intent.

133 F.2d at 162.

It is instructive that Congress in 1948, in the wake of that pronouncement, re-enacted without material change the statutory language that had been construed in the court's decision. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). Congress's election not to change the language confirms that the current provision continues to embody the principle of jurisdictional parity long promoted by Congress, and according to which a national bank—just like its state counterpart—is not rendered a citizen of every State in which it may maintain a branch office or other form of physical presence.

3. The court of appeals determined that, insofar as Congress intended to establish jurisdictional parity between national and state banks, it did so only in the "limited sense" of making national and state banks alike dependent on diversity jurisdiction for access to federal court. Pet. App. 26a. In the court's view, Congress did not go so far as to prescribe that national banks and state banks be subject to parallel rules for determining their corporate citizenship. *Ibid.* That analysis misses the mark.

First, even if the court of appeals were correct in asserting that Congress sought only to require both national and state banks to rely on diversity of citizenship as the means of obtaining federal jurisdiction, that begs the question of which rules to apply in determining the citizenship of a national banking association for diversity purposes. And with respect to that issue, in view of the absence of indication by Congress of an intention to renounce the traditional and settled approach, the longstanding jurisdictional principles ap-

plicable to all other corporations should apply to national banking associations.

The contrary approach of the court of appeals would apply a novel citizenship rule for national banks, under which national banks with out-of-state branch offices would have a far more limited ability to obtain diversity jurisdiction than a state bank or any other corporation. It would be incongruous, in the context of Congress's longstanding efforts "to place national and state banks on a basis of 'competitive equality' insofar as branch banking [is] concerned," *First Nat'l Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966), for branching to entail substantially disparate jurisdictional consequences as between national and state banks. The result would be especially anomalous in that a bank with a *federal* charter would have significantly lesser access to a *federal* forum than a bank (or other corporation) chartered by a State.

Bank of America, N.A., for instance, operates branch offices in some 30 States. See Pet. 10. Whereas a state bank with interstate branches would be deemed under the traditional rule a citizen of only one State (or deemed pursuant to the statute a citizen of perhaps two States, see 28 U.S.C. 1332(c)(1)), Bank of America, under the court of appeals' view, would be considered a citizen of all 30 States in which it presently maintains a branch. A state bank under that view could expand its interstate operations without jurisdictional consequence; but any expansion by a national bank into a new State would decrease its access to diversity jurisdiction. It would be odd for Congress to have granted national banks citizenship in a State so as to enable them to invoke diversity jurisdiction, see *Bankers Trust Co.* v. *Texas & Pacific Ry.*, 241 U.S. 295, 309-310 (1916) (federally chartered corporation generally not a citizen of any State for purposes of diversity jurisdiction unless Congress confers state citizenship), but then to impose a citizenship test under

which a national bank's expansion would constrict—and potentially even eliminate altogether—the availability of diversity jurisdiction.[6]

Moreover, there is nothing talismanic about a "branch office" from the perspective of the court of appeals' "physical presence" standard. Pet. App. 4a, 31a. Offices short of a "branch" might be viewed as establishing the requisite physical presence, see *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 404-409 (1987); cf. *First Nat'l Bank* v. *Dickinson*, 396 U.S. 122 (1970) (bank's armored car messenger service and drop boxes constitute "branch" locations), as might other manifestations of a permanent physical presence. Bank of America, for instance, currently maintains proprietary ATMs in some 45 States. See Bank of America, *Investor Fact Book* 17 (2004) (*available at* <http://www.media.corporate-ir.net/media_files/nys/bac/4q04factbook_3.pdf>). Insofar as Bank of America could be considered thereby to maintain a physical presence in nearly every State, it already would have been rendered largely ineligible for diversity jurisdiction. Cf. *Independent Bankers Ass'n* v. *Smith*, 534 F.2d 921 (D.C.

[6] The disparity in the jurisdictional consequences of branching under the court of appeals' approach is particularly stark given that, under the provisions of the 1994 law permitting interstate branching, state banks insured by the FDIC generally can engage in interstate branching to the same extent as national banks. See 12 U.S.C. 1831(u)(A)(1). Regions Bank, a state chartered bank, currently operates branch offices in 15 States, the same number of States in which petitioner Wachovia presently maintains branch locations (Wachovia also maintains branch offices in the District of Columbia). See *FDIC Institution Directory* (*available at* <http://www.2.fdic.gov/idasp/main.asp>). Especially in that light, there is no merit to the court of appeals' reliance on the historic purposes of diversity jurisdiction. See Pet. App. 17a-18a. Insofar as the court of appeals questioned the extent to which a national bank could reasonably fear a biased forum in a State in which it maintains branch offices, precisely the same sorts of questions could be raised with respect to any state bank (or other corporation) that conducts operations in the State but that nonetheless is not thereby rendered a citizen of that State for purposes of diversity jurisdiction.

Cir.) (determining that ATMs owned or rented by national bank constitute "branch" offices), cert. denied, 429 U.S. 862 (1976).[7]

Section 1348 should not be read to impose those sorts of substantially disparate and unfavorable jurisdictional consequences for national banks. Rather, as a leading treatise explains, the "term 'located' should be construed to maintain jurisdictional equality between national banks and state banks or other corporations. This approach appears to be well grounded in both policy and common sense." 15 James W. Moore, *Moore's Federal Practice* § 102.56[5] (3d ed. 2005) (footnote omitted).

4. The OCC has adopted that view in an interpretive letter. OCC Interp. Ltr. 952 (Oct. 23, 2002) (*available at* <http://www.occ.treas.gov/interp/feb03/int952.pdf>). The interpretive letter explains that national banks should be treated in a manner similar to state banks for purposes of diversity jurisdiction. *Id.* at 5-6. The letter thus rejects the conclusion that a national bank should be considered a citizen of every state in which it maintains a branch or other presence. The letter further explains that, for a national banking association, the analog of the State of incorporation is the State in which the national banking association's designated main office is located. *Id.* at 6.[8] The letter thus concludes

[7] Although the statutory definition of a "branch" now provides that an ATM fails to qualify, see 12 U.S.C. 36(j), a proprietary ATM station still might be viewed as establishing whatever degree of "physical presence" is contemplated by the court of appeals' standard. Indeed, the ambiguity in the court of appeals' physical-presence standard itself counsels against adopting that approach. See *Sisson* v. *Ruby*, 497 U.S. 358, 378 (1990) (Scalia, J., concurring in judgment) (explaining that rules that produce "vague boundar[ies]" are "to be avoided in the area of subject-matter jurisdiction wherever possible").

[8] Compare 12 U.S.C. 1831u(g)(4)(A)(i) (defining "home State" of national bank as "the State in which the main office of the bank is located"), with 12 U.S.C. 1831u(g)(4)(A)(ii) (defining "home State" of state bank as "the State by which bank is chartered").

that, in the case of an association that has relocated its designated main office to a different State from the one initially identified in the association's organization certificate, the current location of the main office is controlling for purposes of determining the association's citizenship. *Ibid.*[9]

D. This Court's Decision In *Citizens & Southern National Bank* v. *Bougas* Does Not Control This Case

The court of appeals relied heavily on this Court's decision in *Citizens & Southern National Bank* v. *Bougas*, 434 U.S. 35 (1977). That reliance was misplaced. While this Court concluded in *Bougas* that the term "located" encompassed branch offices in the context of the particular statute at issue there, this case involves a different provision with a different purpose.

1. *Bougas* concerned a now-repealed provision governing venue in actions against national banking associations. The provision stated that such actions "may be had in any district or Territorial court of the United States held within the district in which such association may be established," or alternatively, "in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases." 434 U.S. at 35-36 (quoting 12 U.S.C. 94 (1976)).[10] The Court held that, for purposes of that provision, a national bank with its designated place of business in Savannah, Georgia, was also "located" for state-court venue purposes in DeKalb County, Georgia, where it maintained an intrastate branch.

That holding is not controlling here. Because the meaning of the term "located" in the national banking laws varies depending on the context of the particular provision at issue, the interpretation of the former venue provision in *Bougas* does not govern the interpretation of Section 1348. *Bougas* itself recognizes that the term "located" has no rigid meaning. 434 U.S. at 93. And the context at issue in that case differs materially from the context of Section 1348.

The question of venue "is primarily a matter of choosing a convenient forum." *Leroy* v. *Great W. United Corp*, 443 U.S. 173, 180 (1979). That consideration was dispositive in *Bougas*. As the Court explained, in enacting the venue provision, "Congress was concerned with * * * the untoward interruption of a national bank's business that might result from compelled production of bank records for distant litigation," a concern that "largely evaporates when the venue of a state-court suit coincides with the location of an authorized branch." 434 U.S. at 44; see *id.* at 44 n.10.

Such concerns are not controlling in the context of Section 1348. The question of citizenship for purposes of diversity jurisdiction does not turn on considerations of convenience among available forums. If it did, corporations routinely would be deemed citizens of any State in which they maintain a significant presence. The question of citizenship instead pertains to the power of a court to hear a case in the

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[9] After explaining that a national banking association should be treated similarly to a state bank for citizenship purposes and that the relevant State is the one in which the association's main office is currently located, the interpretive letter states that a national bank should be considered a citizen of that State *and* the State in which the association's principal place of business is found, if different. OCC Interp. Ltr. 952, *supra*, at 6. In the case of a national banking association, the State of the main office usually does not differ from the State of the principal place of business. That is true in this case. See p. 5, *supra*. This case therefore does not raise the question whether a national bank should be considered a citizen only of the State of its main office, or instead should also be considered a citizen of, if different, the State of its principal place of business.

[10] The provision was repealed in 1982 and replaced by a provision limited to defining venue in actions against national banks for which the FDIC has been appointed receiver or against the FDIC as receiver of a national bank. See 12 U.S.C. 94. All other actions involving national banks are now governed by the general venue statute. See 28 U.S.C. 1291.

first place, and it is illuminated by longstanding and deeply rooted principles. "This basic difference between the court's power and the litigant's convenience is historic in the federal courts." *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-168 (1939). The distinction was all the more salient when the word "located" was introduced in Section 1348's precursors; at that time (before *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938)) access to diversity jurisdiction determined the substantive law governing the action.

Significantly, the result in *Bougas* had the effect of generally aligning the treatment of national banks with the treatment of other corporations for purposes of venue. While venue typically is governed by statute and the particular provisions may vary among the States, a corporation ordinarily may be sued where it has a place of business. See 92A C.J.S. *Venue* § 86 (2000) ("In many jurisdictions there are statutes under which venue may be laid in the county where the defendant transacts business, or has a place of business * * * ."); 67 C.J. *Venue* § 159 (1934) (same). See also 28 U.S.C. 1391(c) (corporation may be sued "in any judicial district in which it is subject to personal jurisdiction"); 19 C.J.S. *Corporations* § 717(c) (1990) (noting that, "ordinarily," a corporation "is not privileged to be sued only" in "the county where it has its principal place of business"). *Bougas* was consistent with that approach in holding that venue lay against a national bank in any county that contains an intrastate branch. The court of appeals' interpretation of Section 1348 in this case has the opposite effect. That interpretation would establish an anomalous rule of citizenship for national banks at odds with the longstanding principle that a corporation is not a citizen of every State in which it conducts business or maintains a physical presence.

2. The court of appeals, again relying on *Bougas*, attached significant weight to the presence in Section 1348 of the word "established" in the paragraph that precedes the

one containing "located." See Pet. App. 7a-13a. The court believed that the two terms must be given different meanings. That view is incorrect.

When the national banking laws were originally enacted in the 1860s, the place where a bank was "located" was the same as where it was "established" because national banks were barred from establishing any branch locations. See 1864 Act § 8, 13 Stat. 101-102 (referring to "office or banking house *located* in the place specified in its organization certificate," *i.e.*, where it was established) (emphasis added). And because it remains the case that the word "located" refers in a number of provisions to a bank's designated main office, see pp. 12-13 *supra*, the word is generally synonymous in those provisions with the place where the bank is "established." See, *e.g.*, 12 U.S.C. 30(b) (treating designated "main office" as place where association "is located"). The court of appeals' approach thus rests on the assumption that, whereas "located" and "established" can have the same meaning when found in separate provisions, they must be given different meanings when found in the same provision. There is no warrant for adopting any such rigid interpretive rule.

That is particularly true in this case because it is a happenstance of codification that the paragraphs containing "located" and "established" appear together in Section 1348 rather than in separate provisions. The statutory predecessors of the two paragraphs were enacted in separate provisions in different years. See § 4, 24 Stat. 554 (1887) (original version of paragraph now containing "located"); Act of Dec. 1, 1873, ch. 7, § 629 (Tenth to Eleventh), 17 Stat. 111 (original version of paragraph now containing "established"). The provisions were first combined in one provision as part of the consolidation of the Judicial Code in 1911. § 24 (Sixteenth), 36 Stat. 1092. That statute stated explicitly that the "arrangement and classification of the several sections of this Act" were "made for the purpose of a more convenient and

orderly arrangement" rather than to effect any substantive change. § 295, 36 Stat. 1167; see § 294, 36 Stat. 1167. In that light, it is not surprising that this Court has used the terms "located" and "established" as alternatives when discussing the citizenship of a national banking association. See *Cope* v. *Anderson*, 331 U.S. 461, 467 (1947) ("For jurisdictional purposes, a national bank is a 'citizen' of the state in which it is established or located, and in that district alone can it be sued.") (citation omitted).

The presence of the word "established" in a separate paragraph of Section 1348 therefore does not dictate any particular reading of the word "located." Rather, the term "located" should be interpreted consistently with the long-standing rules for determining corporate citizenship, under which a corporation is not a citizen of every State in which it conducts business or maintains a physical presence.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Section 1348 of Title 28, United States Code, provides:

The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

No. 04-1186

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In The
Supreme Court of the United States

WACHOVIA BANK, NATIONAL ASSOCIATION,

Petitioner,

v.

DANIEL G. SCHMIDT, III, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether a United States District Court has diversity jurisdiction over a national bank which maintains branch offices in the forum state, when 28 U.S.C. § 1348, the statute setting out jurisdiction, provides national banking associations are "deemed citizens of the states in which they are respectively located."

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STATEMENT OF THE CASE

The suit underlying this appeal arose from financial services provided by the Petitioner to the Respondents. Before 1998, Wachovia Bank provided personal and business banking services to Daniel Schmidt. Following the sale of Schmidt's businesses in May 1998, Wachovia continued to manage substantial sums received from that sale. Because of this existing relationship, Wachovia approached Schmidt about his potential exposure to significant capital gains tax liability, and advised him that the bank could provide an investment strategy which offered a substantial investment return and in addition would shelter the tax liability he was facing from the sale of his business.

In 1998, while acting as tax and financial advisors to the Respondents, Wachovia, along with KPMG, LLP and others persuaded Respondents to purchase an investment strategy known as a Foreign Leveraged Investment Program ("FLIP") which allegedly provided a so-called "basis shift" to shelter capital gains. The safety of this strategy was misrepresented and its risks were never revealed. As a result, the Respondents suffered losses.

The Respondents brought suit in 2003 in the South Carolina Court of Common Pleas against the Petitioner, KPMG and others for actions arising out of the consulting services performed for the Respondents by the Petitioner and others. The Respondents sued for declaratory relief and for damages resulting from civil conspiracy, fraud, constructive fraud, negligent misrepresentation, promissory estoppel, breach of

fiduciary duties, aiding and abetting, and violations of the South Carolina Unfair Trade Practices Act. The Respondents have since resolved their claims against all of the other defendants in the state court action except the Petitioner.

On the basis of diversity jurisdiction and provisions of the Federal Arbitration Act, Petitioner commenced a federal court proceeding by filing a petition to compel arbitration in the United States District Court for the District of South Carolina. KPMG and the remaining defendants in the state court case filed their motions to compel arbitration in the state court which were denied by the state court judge.

On August 1, 2003, the United States District Court also denied the Petitioner's arbitration petition. The Petitioner appealed this decision to the Fourth Circuit Court of Appeals. The Fourth Circuit, however, did not rule on the arbitration issue. Instead, it decided that the District Court lacked subject matter jurisdiction over the matter. The Fourth Circuit Court of Appeals held the Petitioner is a citizen of the state of South Carolina under 28 U.S.C. § 1348, because it maintains branch offices which are "located" in that state. Since the Respondents are also citizens of South Carolina, the court of appeals concluded that diversity jurisdiction was lacking.

SUMMARY OF THE ARGUMENT

It is undisputed this case may be removed to federal court only if the court has jurisdiction by virtue of the diversity of citizenship of the parties. The statute

which governs jurisdiction over national banking associations provides that they shall "be deemed citizens of the States in which they are respectively located." 28 U.S.C. § 1348.

The meaning of the statute is a matter of statutory interpretation. Under the first principle of statutory interpretation, the plain meaning of the term "located" is anywhere a national bank has a physical presence, such as in a branch banking office. Nothing in the statute suggests that "located" must be confined to only one place. The fact corporations may have multiple citizenship for jurisdiction purposes further suggests no intent to limit the citizenship of a national bank to only one state.

Under the rule of construction that different words in the same statute are intended to have different meanings, the plain meaning of the statute as a whole indicates that the meaning of "located" is different from the meaning of "established" which is used in the first part of the statute. In contrast to the plain meaning of "located" as referring to a bank's physical presence, the word "established," as used in the statute, means where a national bank is designated in its organizational certificate.

Section 1348 may also be read in conjunction with 28 U.S.C. § 1332, governing diversity jurisdiction, which was enacted as part of the same legislation in 1948 as § 1348. Section 1332, was amended in 1958 to include diversity jurisdiction over corporations. The fact that this provision used language markedly different from the terms used in § 1348 further

indicates a congressional intent that they have a different meaning.

That meaning is supplied from the further rule of statutory construction that the same terms in a different statute must be given the same meaning. The statute which governed venue over national banks was in effect at the time § 1348 was enacted. As the venue statute used very similar language to that used in § 1348, then the meaning applied to the terms in the venue statute must likewise be applied to § 1348.

The meaning of those terms was established in *Citizens and S. Nat'l Bank v. Bougas*, 434 U.S. 35 (1977), where this Court held "located" means any place a national bank operates a branch office. The doctrine of *in pari materia* also applies to define "located," as used in § 1348, in the same manner that the *Bougas* Court defined it in the venue statute. This follows from the fact the two statutes deal with the same subject matter and share a common legislative origin.

Beyond the plain meaning of the unambiguous terms of § 1348, the statutory history reveals that the terms "located" and "established" have separate meanings. Indeed, the early statutes suggest that "located" has connotations, at least, of where a national bank is "doing business." These meanings remained unchanged into the enactment of the current § 1348. Thus, the legislative history supports the conclusion that a national bank is a citizen of every state in which it operates a branch office.

Nor does the legislative history suggest that Congress was unaware of the possibility of interstate branch banking when it enacted § 1348. By merger, for example, interstate branch banking was permitted before § 1348 was enacted. The fact that it was not widespread does not mean that Congress must have meant § 1348 to limit a national bank's citizenship to a single state.

The conclusion that a national bank is a citizen of every state in which it operates a branch office is not disturbed by the application of the doctrine of jurisdictional parity. Jurisdictional parity derives from the removal of federal question jurisdiction which had originally applied to national banks by virtue of their federal character, leaving them in jurisdictional parity with state banks. A careful reading of the decisions reveals that the removal of broad federal question jurisdiction did not at the same time enlarge the courts' diversity jurisdiction over national banks.

Nor does the policy of "equality of competition" require that a national bank's citizenship be limited to one state. The cases recognizing the policy addressed fairness in business competition between national and state banks. They did not extend the policy to include equal results in court procedures. Moreover, the policy advocated by the Petitioner would, itself, produce inequalities.

Nor does the enactment of § 1348, a few years after a single appeals court decision, imply that § 1348 was intended to incorporate the holding from that case. The rule of construction is limited to the enactment of

legislation after the meaning of a term has been consistently applied or settled. One case on the point did not settle the meaning of the word "located."

Finally, the concept of citizenship does not require that a national bank be deemed a citizen of only one state. By analogy, corporations are expressly allowed, in the statute governing diversity jurisdiction over them, to be citizens of more than one state. Any further analogy between corporations and national banks is weakened by the very different language employed in the statute governing jurisdiction over corporations from that used in § 1348.

ARGUMENT

I. THE PLAIN MEANING OF THE STATUTE GOVERNING JURISDICTION OVER NATIONAL BANKS DEMONSTRATES THAT A NATIONAL BANK IS DEEMED TO BE A CITIZEN OF EVERY STATE IN WHICH IT OPERATES A BRANCH OFFICE.

A. The Jurisdiction Of The Federal Courts Over National Banking Associations Is A Congressional Decision.

Congress sets the subject matter jurisdiction of the lower federal courts. For national banking associations, the statute permits subject matter jurisdiction through both the involvement of a federal question and diversity of citizenship. The statute states as follows:

> The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association *established* in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

> All national banking associations shall, for purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively *located*.

28 U.S.C. § 1348 (emphasis added). In the first paragraph, federal question jurisdiction is retained over certain, limited types of actions. The second paragraph covers all other cases, permitting jurisdiction on the basis of diversity of citizenship over national banks by deeming them to be citizens of the states in which they are respectively located.

In the case at hand, the first paragraph does not apply. The suit brought here fits none of the categories set out. Whether jurisdiction is available under the second paragraph depends on whether the Petitioner is "located" in South Carolina. It is undisputed that the Petitioner has its principal place of business in another state. It is also undisputed that it maintains branch banking offices in South Carolina. If maintaining branch offices means that it is "located" in South Carolina, then it is deemed a citizen of that state. Diversity jurisdiction would, then, be defeated, since the Respondents are also citizens of South Carolina.

B. Under The Principles Of Statutory Construction, The Courts Must Apply The Plain Meaning Of The Statute.

The meaning of § 1348 is a question of statutory construction. The first principle of statutory construction is that the words of a statute should be

given their plain and ordinary meaning. *Rubin v. United States*, 449 U.S. 424 (1981); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). Where the statute does not provide an express definition of the term in question, the courts construe the term in accordance with its ordinary or natural meaning. *See FDIC v. Meyer*, 510 U.S. 471 (1994).

The courts must give effect to the unambiguously expressed intent of Congress. *Norfolk and Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991). When a court finds the terms of a statute to be unambiguous, the judicial inquiry should be complete. *Freytag v. C.I.R.*, 501 U.S. 868 (1991). For a statute to be unambiguous, it need only be plain to anyone reading the Act that the statute encompasses the conduct at issue. *Salinas v. U.S.*, 522 U.S. 52 (1997).

1. The Plain Meaning Of The Key Words Shows That "Located" Means Wherever A National Banking Association Maintains A Branch Office.

a. "Located" Means Physical Presence.

The word "located" is a general term referring to physical presence in a place. *See e.g., Webster's Third New International Dictionary* 1327 (1993) (defining "locate" as "to set or establish in a particular spot or position," and "location" as "a position or site occupied or available for occupancy."); *Black's Law Dictionary* 958 (8th ed. 2004) (defining "location" as '[t]he specific place or position of a person or thing"). This was equally

true in 1948, when § 1348 was enacted, and in 1887, when the phrase "citizens of the States in which they are respectively located" was first used in the predecessor statute to § 1348. *See* Act of Mar. 3, 1887, ch. 373, § 4, 24 Stat. 552, 554-55 ("the 1887 Act"). *See e.g., Black's Law Dictionary* 1089 (4th ed. 1968) (defining "location" as "site or place"); 8 *Oxford English Dictionary* 1081 (2nd ed. 1989) (defining "locate" as "[t]o fix or establish in a place; to settle; *pass.* to be settled, stationed, or situated," and providing examples of usage from 1807 through 1896 that universally involve physical presence in a place). Moreover, the sixth edition of *Black's Law Dictionary*, one of the few sources to consider the past participle "located" separately as a general legal term, emphasizes the connotation of physical presence. *Black's Law Dictionary* 940 (6th ed. 1990) (defining "located" separately as "[h]aving physical presence or existence in a place") . In one case cited by the *Bougas* Court, it was pointed out,

> Another definition of "locate" given by Webster's New International Dictionary, Second Edition, is "to search for and discover the position of; as to Locate an enemy; to Locate a fire." This element of discovery, inherent in the word 'locate' but not in the word 'establish,' appears to have been in the mind of the Court in *Lapinsohn v. Lewis Charles, Inc.*, 212 Pa. Super. 185, 240 A.2d 90, cert. den. *First Camden National Bank & Trust Co. v. Lapinsohn*, 393 U.S. 952, 89 S.Ct. 376, 21 L.Ed.2d 363, when it said a national bank by setting up a branch to conduct a

> general banking business, manifested an intent "to be found" in that jurisdiction and so had waived its statutory immunity to suit there.

Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co., N.A., 281 N.C. 525, 189 S.E.2d 266 (1972) (cited in *Bougas, supra*, 434 U.S. at 40). Accordingly, under the ordinary meaning of the word, "located" means wherever a national bank has a physical presence.

b. Physical Presence Is Not Limited To One Location.

The Petitioner suggests that the word "located" is ambiguous as between any physical presence, and a single, unique physical presence. This supposed ambiguity, however, is not found in the ordinary meaning of the term. Nothing in the definitions requires the physical presence to be unique or to exclude other distinct locations.

As part of the reason that "located" may not mean any physical presence, the Petitioner argues that national banks are analogous to corporations. Corporations, however, may be incorporated in more than one state. As stated in *Louisville New Albany & Chicago Ry. Co. v. Louisville Trust Co.*, 174 U.S. 552 (1899),

> This court has often recognized that a corporation of one State may be made a corporation of another State by the legislature of that State, in regard to

> property and acts within its territorial jurisdiction.

Id. at 562 (citing *inter alia Ohio & Mississippi R.R. Co. v. Wheeler*, 66 U.S. 286 (1861)). On this same point the Fifth Circuit said,

> Through multiple places of incorporation, principal place of business and alter ego or consolidation doctrines, a corporation may become the citizen of several places for purposes of diversity jurisdiction. Such a result is in keeping with Congress' intendment to constrict the availability of diversity jurisdiction.

Panalpina Welttransport GmBh v. Geosource, Inc., 764 F.2d 352, 354 (5th Cir. 1985).[1] Consequently, even with particular reference to its effect on diversity

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[1] *See also* 8 William Meade Fletcher, *Cyclopedia of the Law of Corporations* § 4031, p. 417 (Perm. ed. 2001) (corporation incorporated in more than one state becomes a citizen of each state of incorporation) (citing *Memphis & C.R. Co. v. Alabama*, 107 U.S. 581 (1882); *I.B.P.O. Elks of World v. Grand Lodge I.B.P.O. Elks of World, Inc.*, 50 F.2d 860 (4th Cir. 1931)). As the court stated in *I.B.P.O. Elks*, "[t]hat the same persons may incorporate under the same name in two or more states is too well settled to admit of discussion." *Id.* at 862. *See also Jacobson v. New York, N.H. & H.R. Co.*, 206 F.2d 153 (1st Cir. 1953), affirming *per curiam* without an opinion the decision of the First Circuit in which the court was held to lack diversity jurisdiction over a corporation incorporated under the laws of both Connecticut and Massachusetts. In that case, the court of appeals noted that "[t]he only policy consideration which is apparent is that we should not be astute to widen federal diversity jurisdiction." *Id.* at 155 (quoting *McCoy v. Siler*, 205 F.2d 498 (3rd Cir. 1953)).

jurisdiction, corporations may be incorporated in, and, thus, citizens of more than one state.[2] As a result, nothing in the diversity jurisdiction over corporations requires that a national bank may not be a citizen of more than one state.

c. A National Bank Becomes Physically Present In A State Through A Branch Bank.

As the court of appeals below pointed out, it is indisputable that a national bank becomes physically present in a state when it opens branch offices in that state and conducts business there. The Petitioner never challenges this statement. For example, under 12 U.S.C. § 92, any national bank is authorized to operate as an insurance business in any place in which it is "located and doing business." It follows that within the ordinary meaning of the word, that a national bank is "located" where it is doing business. This is very different from the Petitioner's conclusion that a bank is located only where it is so designated in its organizational certificate.

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[2] Where a corporation was incorporated in more than one state, the "forum doctrine" sometimes applied to deem the corporation a citizen only of the state of the forum. The adoption of § 1332, however, has cast doubt on this doctrine. *See* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3626, p. 655 (2d ed. 1984) (arguing that the doctrine should be discarded because of § 1332(c)(1)). On this point, Wright and Miller refer to the "overriding purpose" of § 1332 to limit diversity jurisdiction. *Id.* at p. 656 (citing Sen. Rep. No. 1830, 85th Cong., 2d Sess. (1958), reprinted in 2 U.S. Code Cong. & Admin. News, 1958, p. 3099).

2. The Use of the Modifier "Respectively" In § 1348 Does Not Indicate That A National Bank's Location Must Be Limited To One Place.

Section 1348 addresses national banking associations in the plural. It says that they "shall . . . be deemed citizens of the states in which they are respectively located." On its face, this suggests that banks may be citizens of more than one state.

The word "respectively" is variously defined. The dictionary definition of "respectively" is given as "in the order named or mentioned." *See e.g., Webster's New Twentieth Century Dictionary* 1327 (2nd ed. 1983). Several cases discussing the word have held "respectively" to mean "as relating to each." *State v. Gaughan*, 124 Ark. 548, 187 S.W.2d 918 (1916); *State ex rel. Johnson v. Boyd*, 217 Ind. 348, 28 N.E.2d 256 (1940) (same); *Weeks v. Thompson*, 66 Ohio App. 1, 31 N.E.2d 454 (2 Dist. 1940) (same). In *Wolf v. Lake Erie & W.R. Co.*, 55 Ohio St. 517, 45 N.E. 708 (1896), it was held to mean "singly or severally considered; singly in the order designated; as relating to each."

"Respectively" modifies "located" and "located" refers to banking associations. Thus, the paragraph addresses the location "as relating to each" bank, or where the banks are located, "singly or severally considered."

The effect of this is shown by considering the statute, with the word omitted from the paragraph.

Without the modifier "respectively," all banks would be deemed citizens of the states where they are located, such that any one bank would be considered a citizen of every state in which every other bank is located. The addition of the word "respectively" avoids this problem by limiting citizenship to those states in which the banks, singly and severally considered, are located. In any event, the inclusion of the word "respectively" does nothing to undermine the framing of the paragraph in the plural or to imply that a national bank may be deemed a citizen of only one state.

3. Viewed As A Whole, The Statute Makes Clear That "Located" Must Mean Something Different From "Established."

a. The Different Terms "Located" And "Established," Both Used In § 1348, Must Be Given Different Meanings.

The Petitioner argues that "located" means the same as "established." This follows, the argument goes, from the fact that, under the original laws restricting a national bank to one place of business, where it was "established" and where it was "located" were always the same place. This confuses the meaning of the words with the result. This Court answered that argument in *Citizens and S. Nat'l Bank v. Bougas*, 434 U.S. 35 (1977), dealing with the very similar venue statute, when it said:

> Throughout this early period, the words "established" and "located" led to the same ultimate venue result. Nevertheless, the two words are different. One must concede that a federal judicial district, which the statute associates with the word "established," is not the same as the geographical area that delineates the jurisdiction of a state court, which the statute associates with "located."

Id. at 43-44.

The rules of construction require that, where different words are used in different parts of the same statute, it is presumed that the words are used with a different intent. *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U.S. 152 (1912); *Bates v. U.S.*, 522 U.S. 23 (1997). *See also White v. Lambert*, 370 F.3d 1002, 1011 (9th Cir. 2004) ("It is axiomatic that when Congress uses different text in 'adjacent' statutes it intends that the different terms carry a different meaning.").

Thus, looking beyond the individual words, to the statute as a whole, it is clear the Petitioner's - "located" should be taken to mean the same thing as "established"- argument must fail. The argument is contrary to the rules of construction. The word "established" is used in the first paragraph of § 1348 to discuss federal question jurisdiction. The first paragraph grants the district courts jurisdiction over "any action by a banking association *established* in the

district for which the court is held" to enjoin the Comptroller of the Currency or his receiver under chapter 2 of title 12. 28 U.S.C. § 1348 (emphasis added). In the paragraph immediately following, the word "located" is used to discuss diversity jurisdiction, saying that national banks shall be "deemed citizens of the States in which they are respectively *located*." 28 U.S.C. § 1348 (emphasis added).

Moreover, a national bank can have two different kinds of presence. As the court of appeals below pointed out, a bank can have a physical presence by operating an office, and can have a designated presence, required to be shown in its organizational certificate as "where its operations of discount and deposit are to be carried on." 12 U.S.C. § 22. This is similar to the distinction made by this Court in *Bougas* that ". . . a federal judicial district, which the statute associates with the word "established," is not the same as the geographical area that delineates the jurisdiction of a state court, which the statute associates with "located." *Bougas*, 434 U.S. at 43-44. A national bank's designated presence is set out in its organizational certificate. This is very similar to a state bank's charter. Where a national bank is chartered is universally regarded as where it is "established." *Bougas*, 434 U.S. at 39. Thus "established" indicates where a national bank is designated in its certificate of organization. *See also Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976) (the place specified in a national bank's charter as its home office is determinative of the district in which the bank is established).

Moreover, the ordinary meaning of the word "established," connotes an *original* and *permanent* location. *See e.g., Webster's Third,* at 778 (defining establish as "to place, install, or set up *in a permanent or relatively enduring* position esp. as regards living quarters, business, social life, or possession," or "to bring into existence, create, make, start, originate, found, or build usu[ally] *as permanent or with permanence in view*" (emphasis added)). A national bank is originally and permanently established at its main office, which cannot be moved more than thirty miles outside the city of its original location, and even then only with the approval of two-thirds of the shareholders and the Comptroller of the Currency. 12 U.S.C. § 30(b). Beyond that, a bank is only temporarily located at its branch offices, which it can open and move at will, subject to the approval of the Comptroller. 12 U.S.C. § 36(i).

If, as the Petitioner argues, "located" and "established" had been intended to mean the same thing, Congress could have used the same word in both parts of § 1348. The fact that it did not indicates intent that the words do not have the same meaning. This is especially true considering the connotation that the word "established" has for the place designated in a national bank's organizational certificate, when compared to the plain meaning of "located" as a place of physical presence.

b. A Comparison Of § 1348 And § 1332 Shows The Different Terms Must Be Given Different Meanings.

A statute is to be considered in all its parts when construing any one of them. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). This is a fundamental principle of statutory construction. *Deal v. U.S.*, 508 U.S. 129 (1993). The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). *See also King v. St. Vincent's Hosp.*, 502 U.S. 215 (1991) (meaning of the language, plain or not, depends on the context).

While § 1348 deals with jurisdiction over national banking associations, § 1332(c)(1) deals with jurisdiction over corporations. 28 U.S.C. § 1332(c)(1). Both sections deal with diversity jurisdiction and speak to jurisdiction in parallel terms. In § 1332,

> a corporation shall be *deemed to be a citizen* of any State by which it has been incorporated and of the State where it has its principal place of business . . .

28 U.S.C. § 1332(c)(1) (emphasis added). In § 1348, national banks "shall . . . be *deemed citizens* of the States in which they are respectively located." 28 U.S.C. § 1348 (emphasis added). These parallel statutes, then, apply very different language.

Moreover, although § 1348 and § 1332 are codified in different sections of the Code, they originated in the same legislation. Section 1348, enacted June 25, 1948, c. 646, §1, 62 Stat. 933, was based on 28 U.S.C., 1940 ed., § 41(16) (Mar. 3, 1991, ch. 231, § 24, ¶ 16, 36 Stat. 1092). Similarly, § 1332, enacted June 8, 1948, c. 646, § 1, 62 Stat. 930, was also based on 28 U.S.C., 1940 ed., § 41(1) (Mar. 3, 1991, ch. 231, § 24, ¶ 1, 36 Stat. 1091)]. The specific provision governing diversity jurisdiction over corporations was added in 1958. July 25, 1958, P.L. 85-554, § 2, 72 Stat. 415. Nevertheless, Congress added the subsection dealing with corporations to the jurisdiction statute and applied parallel language to the jurisdictional statute governing national banks. Considering their common origins and their similar purpose and structure, the two sections must be read together.

Crucially important in this comparison is the fact that § 1332 applies very different language to corporations than the language § 1348 applies to national banks. Although both are deemed citizens of states, corporations are deemed to be citizens where they are incorporated and where they have their principal place of business. National banks, by contrast, are deemed citizens where they are "located." Again, under the principle that different terms in the same statute must be given different meanings, the term "located" under § 1348, cannot mean the same thing as "the place of incorporation or principal place of business" as used in § 1332.

This comparison further undermines the argument that there is a close analogy between

national banks and corporations for jurisdictional purposes. While it is true that a corporation's charter is similar to a national bank's organizational certificate, the very fact that § 1332 employs language so different from the word "located," indicates a clear congressional intent that national banks and corporations are to be treated differently. The Petitioner and the Comptroller argue that a corporation's citizenship under § 1332 helps to show that a national bank is "located" where it is designated in its organizational certificate. On the contrary, under the rule of construction, the use of words in § 1332, so different from those used in § 1348, shows just the opposite. The similarities between corporations and national banks only highlight the fact that the statutes treat them so differently. Viewed together, then, the statutes indicate that "located" is not intended to have the same meaning as where a national bank is designated in its certificate.

4. The Same Terms In Different Statutes Must Be Given The Same Meaning.

Just as the differences between § 1348 and § 1332 shed light on what the word "located" does not mean, the similarities between § 1348 and the statute dealing with venue over national banks reveal what "located" does mean. The rule of construction here is that identical words used in different parts of the same act are intended to have the same meaning. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561 (1995); *C.I.R. v. Lundy*, 516 U.S. 235 (1996). Moreover, the same words used in different statutes on the same subject are ordinarily

interpreted to have the same meaning. *Williams v. Taylor*, 529 U.S. 420 (2000).

The use of the word "located" as meaning wherever a national bank operates a branch office was confirmed by this Court in *Bougas*. Applying the rules of statutory construction, the *Bougas* Court analyzed the statute which once governed venue over national banks and which contained language identical to § 1348. Under the prior version of that statute,

> Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be *established*, or in any State, county, or municipal court in the county or city in which said association is *located* having jurisdiction in similar cases.

12 U.S.C. § 94 (Rev. Stat. § 1598, *as amended by* Act of Feb. 18, 1875, ch. 80, § 1, 18 Stat. 316, 320).[3]

In *Bougas*, the Court noted that the courts "appear to be unanimous in holding that a national bank . . . is "established" only in the federal district that encompasses the place specified in the bank's charter." *Id.* at 39. The Court rejected the argument that "located" could not have been intended to include branch banks because branch banks were essentially non-existent at the time the original venue statutes

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[3] Congress amended this statute in 1982 removing the language construed by the Court in *Bougas*. *See* 12 U.S.C. § 94.

were enacted in 1863 and 1864. The Court determined that "located," used in close conjunction with "established' in the same statute, must be given a different meaning: "[T]he two words are different . . . . Whatever the reason behind the distinction in the words, it does exist, and we recognize it." *Id.* at 44. Thus, the Court concluded, a national bank was located in any county where it operated a branch office. *Id.* at 38.

The principle that different terms conjunctively used in the same statute is identically applicable to the case at hand. Section 1348 uses the very same words "established" and "located," and uses them in similarly close proximity to one another and in a highly similar context. Thus, as they were held to be different in the venue statute in *Bougas*, the two words must be given their distinct meanings in the jurisdiction statute. Moreover, their meanings in the venue statute should carry over and be applied to § 1348.

5. The Doctrine Of *In Pari Materia* Resolves The Issue.

The application of the doctrine of *in pari materia* shows that "located" means anywhere a national bank has a branch office. The doctrine requires that "All acts in pari materia are to be taken together as if they were one law." *United States v. Stewart*, 311 U.S. 60, 61 (1940). The doctrine applies when two statutes adopt a single consistent vocabulary in reference to the same subject matter. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979). *See also United States v. Srnsky*, 271 F.3d 595, 602 (4th Cir. 2001) (nearly identical language in adjacent

statutory subsections must be read *in pari materia*). It also applies where the statutes are part of the same scheme or plan, *Southland Gasoline Co. v. Bayley*, 319 U.S. 44 (1943), or where the provisions are part of the same act. 73 Am. Jur.2d *Statutes*, §105, p. 316 (2001). Thus, the act must be construed as a whole. *Stafford v. Briggs*, 444 U.S. 527 (1980).

The doctrine applies here because the venue statute, so thoroughly analyzed in *Bougas*, deals with the same subject matter as the jurisdiction statute under examination in the case at hand. Moreover, the venue statute was derived from the same origins, and applies nearly identical language. Therefore, the meaning ascribed to the terms "located" and "established" by the Court in *Bougas* must likewise be applied to § 1348.[4]

a. The Two Terms Deal With the Same Subject Matter.

Both statutes deal with the same or related subject matter. Like the venue statute, § 1348 uses both "esta ished" and "located" to "refer to the presence of national banks." Although, generally, the purpose of a venue provision is to accommodate the needs of parties, while jurisdiction deals with a court's power to adjudicate a dispute, the specific statutes here show a

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[4] Although, as previously noted, the venue statute was amended, subsequent amendment or repeal of a statute, however, does not render it irrelevant to *in pari materia* analysis. *See e.g., Benner v. Wichman*, 874 P.2d 949, n. 18 (Alaska 1994); *see generally* 2B *Norman J. Singer, Sutherland's Statutes and Statutory Construction* § 51.04 (6th ed. 2000).

common purpose. The purpose of the venue provision and the purpose of § 1348 is to describe the physical presence of national banks to determine their capacity for, and amenability to, suit in federal court. On this point it must be remembered that the doctrine does not require a perfect identity between the statutes. *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13 (1964); *Hallenbeck v. Pennsylvania Mut. Life Ins. Co.*, 323 F.2d 566, 571 (4th Cir. 1963) ("relate to same persons or things, or same class of persons or things, or have a common purpose . . . "). The Petitioner argues that, although both statutes have the same subject matter, the doctrine does not apply because the statutes have different purposes. As the court of appeals below discussed, the cases cited do not support this contention. *See* Pet. App. 14a-16a. Moreover, the Petitioner never explains how the purpose of the venue provision to promote the convenience of the parties makes the meaning of "located" different in that statute from its meaning in the jurisdiction statute.

b. The Two Terms Originated From The Same Statutes.

Not only do both statutes deal with the same subject matter, they are derived from the same statutes. The venue statute originated from the same legislation dealing with national banks as § 1348. In 1948 when Congress enacted § 1348, it used the same terms as it had used in 12 U.S.C. § 94, dealing with venue over national banks. Moreover, the 1948 enactments grew out of the 1911 codification where Congress legislated the precursors to the venue and jurisdiction statutes. The jurisdiction provision is found at Act of Mar. 3,

1911, Pub. L. 61-475, § 24, 36 Stat. 1087, 1092-1093, ch. 2 (1911). The venue provision was codified by Act of Mar. 3, 1911 ch. 231, § 291, 36 Stat. 1167.

The venue and jurisdiction provisions are joined even further back. The venue statute, 12 U.S.C. § 94, was originally § 57 of Act of June 3, 1864, ch. 106, 13 Stat. 116. This same 1864 Act was cited by this Court in *Petri v. Commercial Nat'l Bank of Chicago*, 142 U.S. 644 (1892), as the original basis of jurisdiction over national banks in federal and state court. *Petri, supra*, 142 U.S. at 647. Because of this common origin, the doctrine applies to construe § 1348 in the same terms as the venue statute. The terms of the venue statute were given their definitive meaning by the Court in *Bougas*. The meaning of those terms, therefore, should be applied to § 1348, with the result that a national bank must be deemed a citizen of every state in which it operates a branch office.

II. EVEN IF THE STATUTE IS CONSIDERED TO BE AMBIGUOUS, THE LEGISLATIVE HISTORY DEMONSTRATES THAT A NATIONAL BANK MAY BE DEEMED A CITIZEN IN ANY STATE IN WHICH IT OPERATES A BRANCH OFFICE.

A. The Early Statutes Used The Words "Established" And "Located" Differently.

The legislative history supports the conclusion that a national bank may be a citizen of any state where it maintains a branch office. The Petitioner and the Amicus both argue that the historical development of

the term "located" in the statute shows that it was intended to mean the same thing as "established." In fact, the legislative history reflects that the word "located" was never meant to mean "established." Indeed, the legislative history shows that the word "located" contains connotations of "doing business."

When Congress set up national banks in 1863, (12 Stat. 681 § 59(c)), it allowed suits in federal courts, "within the district in which the association was established," with no mention of suits in state court. *See Bougas,* 434 U.S. at 41. This was corrected when the National Banking Act was replaced with a new Act in 1864, 13 Stat. 99. ch. 106, which in § 57 carried forward former § 59, but also added the provision that suit may be had "in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

In that form, that section of the Act survived in nearly unchanged language to become the venue statute which the Court analyzed in *Bougas*. Although it is true that the provision in the current § 1348 employing the word "established" came from a different act dealing with federal question jurisdiction, it is undisputed that both "established" and "located" were used by Congress in the same section of the 1864 Act. Moreover, as discussed, in *Petri, supra,* the 1864 Act was not merely a venue statute. That Court treated the 1864 Act as jurisdictional. *Id.* at 647. The 1864 Act also used the word "located" a second time in the same section, in a clause requiring proceedings to enjoin the comptroller to be had in a federal court. This paragraph appears to be the direct precursor to 28

U.S.C. § 1394. Thus, the original statute used the words "established" and "located" differently.

Next, in 1882, in a provision similarly dealing with jurisdiction, the word "established" is used again, but the word "located" is not. Instead, the statute employs the phrase "doing business" to designate where jurisdiction may lie in actions by or against a national bank. The Act provided,

> That the jurisdiction for suits hereafter brought by or against any association *established* under any law providing for national banking associations . . . shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be *doing business* when such suits may be begun . .

Act of July 12, 1882, 22 Stat. 162, c. 290 (emphasis added) (quoted in *Petri, supra* at 645). Thus, the 1882 Act states that jurisdiction over a national bank, established under the laws of the United States, shall be the same as jurisdiction over state banks "where such national banking associations may be *doing business.*" *Id.* (emphasis added). Significantly, the 1882 Act mentioned that national banks are "established" under the laws of the United States, but declined to use that same word as the basis for applying diversity jurisdiction. Instead, the 1882 Act set up diversity

jurisdiction over national banks on the basis of where the national bank was "doing business."

The phrase "doing business" was later replaced with the word "located" in the 1887 Act, which provided as follows:

> Sec. 4 That all national banking associations *established* under the laws of the United States shall, for purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively *located* . . . .

Thus, the word "located" in the 1887 Act follows directly upon and replaces the previous 1882 Act's use of the phrase "doing business." This strongly suggests that where a national bank is "located" in the 1887 Act was meant to be defined as where a national bank is "doing business."

That suggestion is reinforced by this Court's comments in *Herrmann v. Edwards*, 238 U.S. 107 (1915), in which the Court stated that the 1887 Act was "but the re-enactment of an identical provision contained in the 4th section of the Act of July 12, 1882 (chap. 290, 22 Stat. at L. 162, Comp. Stat. 1913, § 9665)." *Id.* at 111. The *Herrmann* Court, thus, reinforced the identity of the word "located" in the 1887 Act with the term "doing business" in the 1882 Act. This is further shown by the *Herrmann* Court's pointing out that the bank involved in that case was "established and carrying on business" in the city where the case arose.

Id. at 114. The early statutes, then, not only treated "located" differently from "established," but the legislative history shows that the 1887 Act's use of the word "located," in a parallel way to the use of the term "doing business" in the 1882 Act, gives "located" at least the connotation of where a national bank may be doing business.

B. The Meaning Of These Two Terms Continued Into The Present Statute.

It is undisputed that the language of the current § 1348 was derived from the 1887 Act. Thus, the difference between "established" and "located" is carried forward to the present § 1348. Also carried forward is the meaning of "located" as colored by the phrase "doing business."

Nevertheless, the Petitioner argues that the use of the word "established" in the 1882 and 1887 Acts is unimportant to an understanding of the use of the same word in the current § 1348. The Petitioner says that the early statutes did not use the word in a "locational sense." (Petitioner's Brief, p. 33-34). That is correct, just as the Fourth Circuit below concluded that "established" does not mean "located." The Petitioner then goes on to assert that the word "established" in the original statutes "served quite a different purpose: it referred to "national banking associations *established* under the laws of the United States . . . ." (Petitioner's Brief, p. 34, n. 16). The Petitioner presumes this is different from how the word is used in the current statute as "a national banking association *established* in the district for which the court is held." The

Petitioner's assertion that the use of the word "established" in the current statute is somehow different from its use in the original statutes is undercut by the fact, as the Petitioner also points out, that this change from the original wording in the 1882 and 1887 Acts to the 1911 codification was "not intended to effect any substantive change in the law." (Petitioner's Brief, p. 18) (citing *Federal Intermediate Credit Bank at Columbia S.C. v. Mitchell*, 277 U.S. 213, 216 (1928); *Herrmann, supra*, 238 U.S. at 117-18). Thus, "established" was never used by Congress in a "locational sense," up to and including its use in current § 1348.

In the 1911 codification, the paragraph dealing with the federal question jurisdiction over national banks in suits against the comptroller, for example, was added to the paragraph dealing with diversity jurisdiction from the Act of 1887. At that point, the 1911 codification produced the language substantially equal to the current § 1348. The fact that the codification of 1911 was not meant to change the meaning of the 1882 and 1887 enactments indicates further that the connotation of "doing business" in the word "located" carries through to the current statute. The legislative history, then, supports the conclusion that "located" means something other than "established." In addition, the "doing business" connotation of the word "located" is carried forward into the current statute.

C. The Opinion Of The Court Of Appeals Below Was Not Mistaken Concerning The Possibility Of Interstate Branch Banks.

The legislative history of the statute simply does not suggest that Congress was unaware of the possibility of interstate branch banking. The Petitioner criticizes the opinion of the court of appeals below for saying that branch banking was permitted before the enactment in 1948 of § 1348. This criticism itself is misplaced. That interstate branch banking was possible before 1994, was demonstrated in the *American Surety* case in which a state bank that had operated interstate branches converted into a national bank. *American Surety Co. v. Bank of California*, 133 F.2d 160 (9th Cir. 1943). Moreover, in *Bougas*, the argument was advanced that national banks were not allowed to engage in any branch banking until 1927 when the McFadden Act, 44 Stat. Pt 2, p. 1224, was passed. In 1933, amending the McFadden Act, Congress permitted national bank branches beyond the place of the charter, though still limited to in-state branches. The *Bougas* Court was urged to conclude, given the fact that branch banks were not permitted when the venue statute was written, that Congress could not have intended "located," as used in the venue statute, to include branch banks. The Court responded, saying "We need not travel that far analytically in determining congressional intent." *Bougas*, 434 U.S. at 43.

> Throughout this early period, the words "established" and "located" led to the same ultimate venue result.

> Nevertheless, the two words are different. One must concede that a federal judicial district, which the statute associates with the word "established," is not the same as the geographical area that delineates the jurisdiction of a state court, which the statute associates with "located."

Bougas, 434 U.S. at 43-44. Thus, the Court dismissed this argument, relying instead on the simple meaning of the words as they were used in the statute.

In addition, the early banking laws permitted a state bank to keep its branch offices when it converted to, or merged with, a national bank. Act of Mar. 3, 1865, ch. 78, § 7, 13 Stat. 459; Revised Statutes of 1875, 18 Stat. 1, 996, & 1003, § 5155. It may be true that interstate branch banking was not in the forefront of congressional concern. To say, however, that Congress could not have had the possibility of branch banks in mind when it enacted § 1348 is inaccurate. The fact that interstate branch banking was not widespread does not mean that Congress must have meant § 1348 to limit a national bank's citizenship to a single State.

D. The Doctrine Of "Jurisdictional Parity" Does Not Require That National Banks Must Be Deemed Citizens Of Only One State.

The Petitioner argues the statutory history shows intent to promote a policy of "jurisdictional parity." Jurisdictional parity refers to the policy of

having national banks and state banks subject to the same jurisdictional rules. As discussed above, the 1863 National Banking Act permitted broad federal question jurisdiction, such that a suit involving a national bank would necessarily trigger federal question jurisdiction because of the federal nature of the bank's character. *See also Petri, supra,* 142 U.S. at 648.

That broad federal question jurisdiction was largely eliminated in the 1882 Act. Addressing that Act in *Leather Manufacturers' Nat. Bank v. Cooper,* 120 U.S. 778 (1887), the Court said it was "evidently intended to put national banks on the same footing as the banks of the State where they were located for all the purposes of the jurisdiction of the courts of the United States." *Id.* at 780. Similarly, in *Mercantile Nat'l Bank at Dallas v. Langdeau,* 371 U.S. 555 (1963), putting off an argument that the 1882 and 1887 Acts altered venue over national banks, the Court stated that the 1882 and 1887 Acts were designed simply to remove federal question jurisdiction based on a national bank's federal charter. The Court said those Acts "apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited." *Id.* at 566.

The Court also discussed this point in *Petri,* saying that the 1882 Act sharply curtailed the federal question jurisdiction. The Court emphasized that the purpose of the statute was to remove broad federal question jurisdiction over cases involving national banks, leaving them subject to the same rules of diversity jurisdiction that are applicable to corporations or individuals. *Petri, supra,* 142 U.S. at

648-49 ("remained unchanged"). In *Petri*, the Court concluded that "there is no reason why Congress intended national banks should not resort to federal courts as corporations and individual citizens might do." *Id.* at 651. The *Petri* Court explained,

> that is to say, that the Federal courts should not have jurisdiction by reason of the subject matter other than they would have in cases between individual citizens of the same State, and so not have jurisdiction because of the Federal origin of the bank.

Id. Thus, the purpose was simply to remove the federal question jurisdiction, and nothing more. The policy goes no further than to leave in place the rules of diversity jurisdiction to apply after removing federal question jurisdiction. As the Court in *Continental Nat'l Bank of Memphis v. Buford*, 191 U.S. 119, 123-24 (1903), pointed out, referring to the removal of federal question jurisdiction, "[n]o other purpose [of the 1882 Act] can be imputed to Congress than to effect that result."

In particular, nothing in these opinions shows a further implication that the same test of citizenship was to be applied to national banks as to corporations. Nevertheless, the Petitioner effectively urges not a jurisdictional parity, but a parity of citizenship, saying that "[t]his principle of jurisdictional parity compels the conclusion that national banks must be treated as citizens of only a single state." (Petitioner's Brief, p. 20). This follows, the Petitioner contends, from the rule

that corporations were treated as citizens only of the State of their incorporation, and that Congress must have had this rule in mind when enacting jurisdiction over national banks. (Petitioner's Brief, p. 20-21).

The difficulty with this argument is that the language dealing with jurisdiction over corporations and the language dealing with jurisdiction over national banks has never been the same. As the Petitioner points out, a corporation was always a citizen where it was incorporated, and more recently, under § 1332, where it has its principal place of business. By contrast, a national bank was always deemed a citizen where it was located.

Moreover, the Petitioner's argument completely fails when it is considered that a corporation may be incorporated in more than one state, and will be deemed a citizen of every state in which it is incorporated. *Louisville New Albany & Chicago Ry. Co., supra* 174 U.S. at 562 This has been specifically held to limit diversity jurisdiction. *Panalpina Welttransport GMBH, supra,* 764 F.2d at 354. Thus, nothing in the law of diversity jurisdiction over corporations suggests that a national bank may not be deemed a citizen of more than one state. Assuming, then, that jurisdictional parity requires the same rules of citizenship must be applied to national banks as are applied to corporations, that assumption does not limit a national bank's citizenship to a single state.

E. A Policy Of "Equality Of Competition" Does Not Require That National Banks Must Be Deemed Citizens Of Only One State.

In addition to "jurisdictional parity," the Petitioner asserts that the ruling of the court of appeals below is contrary to the policy of the banking laws to provide "equality of competition" between state banks and national banks. The Petitioner cites several cases in which the Court has recognized this as one of the goals of the banking statutes. In *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969), the Court stated that "Congress has deliberately settled on a policy intended to foster 'competitive equality.'" *Id.* at 131 (citing *First National Bank of Logan v. Walker Bank*, 385 U.S. 252, 261 (1966)).

In *Lewis v. Fidelity & Deposit Co. of Maryland*, 292 U.S. 559 (1934), cited by the Petitioner, the court held that national banks should be subject to a general lien upon their assets, just as state banks were. According to the Court, the "main purpose of the 1930 [banking] act was to equalize the position of national and state banks." *Id.* at 564. The goal was to provide "equality . . . in competing for deposits." *Id.* The Court went on to point out that the policy is expressed in provisions conferring power to establish branches; in those conferring power to act as fiduciary; in those concerning interest on deposits; and in those concerning capitalization as well as the power to loan on a mortgage. *Id.* at 565.

Significantly, these are all matters of banking business, indicating that the policy involves equalizing competition in business practices. Nothing suggests that it involves insuring equal results in the application of legal procedures. In fact, another portion of that opinion suggests the opposite. When asked to allow the imposition of the liens on the national bank because of a potential conflict between state and federal law, the Court declined to rule on this potential inequality, since the state law had never been applied, leaving no "occasion for complaint." *Id.* at 567. Thus, the Court demonstrated that equality of competition concerns fairness in business practices or opportunities rather than a strictly equal application of legal procedures. This also follows from the fact that the policy of competitive equality is derived from the banking statutes dealing with banking operations and not from the jurisdictional statutes.

In the other cases cited by the Petitioner on "equality of competition," the Court also applied the policy to business practices. In *Walker Bank, supra,* the Court held that national banks could take over existing branch banks, just as state banks were permitted to do. Of course, the ability to operate branch banks is a business, rather than a legal advantage. Similarly, in *Dickinson, supra,* the Court held that a national bank could not operate off-premises banking services in Florida where state banks were not permitted to offer similar customer services. Thus, nothing in these cases indicates that the policy of competitive equality must extend to the application of the legal rules of diversity jurisdiction. As with the argument concerning "jurisdictional parity," the Petitioner overstates the

policy. Competitive equality is meant to promote equal opportunity in business practices. It is not meant to guarantee equal procedural results or rules in the courts.

Furthermore, the argument that "equality of competition" must require that a national bank be considered a citizen of a state in the same fashion as a state bank, contains three fatal assumptions. It assumes, first, that a state court will be prejudiced against a branch office of a national bank, headquartered in another state. While the purpose underlying diversity jurisdiction is to avoid any prejudice in a local court against a foreign party, that concern can hardly be said to exist where the "foreign" party operates branch offices in the forum state, in potentially greater numbers and, thus, with a greater presence, than local banks.

The Petitioner's argument also assumes that being denied jurisdiction in federal court will somehow place a party at a disadvantage. Any dispute, however, could be resolved in the state courts. To maintain that a denial of jurisdiction in the federal court imposes a competitive disadvantage would be to presume that a state court is incapable of rendering justice between the parties. Viewed another way, by suggesting that a party must be allowed to choose between different courts, the claim that competitive equality cannot be achieved without jurisdiction in both federal and state courts is to suggest a right to forum shopping. Competitive equality could not have been meant to achieve such ends.

Third, even if equality of competition between national and state banks were meant to apply to issues of court procedure, the position urged by the Petitioner would not fully achieve that policy. If the Petitioner's interpretation of the statute were adopted, an out-of-state national bank would not be considered a citizen of South Carolina. In a suit brought by an individual resident of South Carolina, a federal court would be able to exercise diversity jurisdiction over that national bank. That same action, however, could not be maintained over a state bank chartered in South Carolina, even though the national bank may be operating as many or more branch offices in South Carolina as the state bank. Such a disparate result could hardly be called competitive equality, even under the Petitioner's interpretation.

F. The Re-enactment Of The Statute After A Single Court Decision Does Not Require A Conclusion That Congress Meant To Incorporate The Holding Of That Case.

The Petitioner argues that the word "located" cannot be meant to include branch banks, because, when § 1348 was enacted in 1948, Congress must have intended to incorporate into the statute a judicial decision on the meaning of that term. In the case of *American Surety Co., supra,* the Ninth Circuit Court of Appeals held that a bank's acquisition of a branch office in another state did not establish citizenship in that state. That case was decided in 1943. The Petitioner argues this holding must have been intended

by Congress to inform the meaning of § 1348 when it was enacted five years later, in 1948.

This is a misapplication of the rule of construction because the rule requires that the judicial or administrative interpretations have been consistent and settled. For its argument, the Petitioner cites *Lorrilard v. Pons*, 434 U.S. 575 (1978). In that case, the Court addressed a statute re-enacted after it had been consistently interpreted over a long period by an administrative agency. The Court even noted that every court which had addressed the issue under consideration there came to the same conclusion. *Id.* at 580, n. 7. Moreover, the same was true in the cases cited in *Lorillard* for the rule of construction. In *NLRB v. Gullett Gin Co., Inc.*, 340 U.S. 361 (1951), the administrative agency had applied a consistent practice which the statute was deemed to have adopted. The Court also pointed out that the agency's practice had been challenged in only two cases and had been upheld in both. In addition, the legislative history disclosed that the agency's practice was considered in detail during the congressional deliberations. *Id.* at 366. Similarly, in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414, n. 8 (1975), the Court stressed that the courts of appeal were "unanimous" in their treatment of the matter which was addressed in the re-enactment of the statute.

In such circumstances, the Court did not need to make a careful statement of the rule of construction. The better statement of the rule was given in the final case cited in *Lorillard*. In *National Lead Co., v. United States*, 252 U.S. 140 (1920), the Court pointed out that

an administrative interpretation of a statute will be given great weight where the agency's interpretation had been applied for many years. This is in line with more recent statements of the rule that the re-enactment of a statute, which has been given a consistent judicial interpretation, is generally presumed to include that settled judicial interpretation. *Pierce v. Underwood*, 487 U.S. 552 (1988); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994); *Bragdon v. Abbott*, 524 U.S. 624 (1998) (settled meaning).

The law in the case at hand, however, was not "settled" merely by the single case when § 1348 was enacted in 1948. There was nothing "consistent" about that interpretation at that time, when no other court had ruled on the issue. Moreover, over the years since 1948, the meaning of "located" could hardly be called "settled," when the lower courts have sharply divided on the question.[5]

What certainly was consistent, however, was the language used by Congress concerning diversity jurisdiction for national banks as opposed to corporations. Throughout the history of § 1348 and § 1332, Congress applied very different language to diversity jurisdiction over national banks from the language applied to diversity jurisdiction over

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[5] *See e.g. Firstar Bank N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001) (holding that "located" does not include branch banks); *World Trade Center Properties, LLC v. Hartford Fire Ins. Co.*, 345 F.3d 154 (2nd Cir. 2003) (national bank is citizen of "every state it has offices"); *Frontier Ins. Co. v. MTN Owner Trust*, 111 F. Supp. 2d 376 (S.D.N Y. 2000) ("located" includes branch banking offices).

corporations, deeming banks to be citizens of the states where they are located, while deeming corporations to be citizens of the states where they are chartered or have their principal place of business. In this regard, it is also significant that the 1948 legislation was not made in response to the *American Surety* case. Rather, it was a broad enactment of procedural provisions covering many subjects.

This raises a key distinguishing characteristic of the *American Surety* case. The court of appeals reached its conclusion in that case on the basis of its belief that "[t]here would appear to be a close analogy between [a national] bank and a corporation national in scope." *American Surety, supra,* 133 F.2d at 162. The Ninth Circuit's presupposition of an analogy between corporations and national banks was undermined by the very different treatment Congress accorded corporations as opposed to national banks. The fact that such different treatment was reiterated in the 1948 statute, even after the *American Surety* decision, reinforces the conclusion that Congress did not impliedly adopt the holding of that case.

The Petitioner argues that, before 1994, it was nearly unheard of for a bank, whether state-chartered or national, to operate a branch office across state lines. The Petitioner asserts this point as proof that Congress could never have meant the word "located" to have applied to inter-state branch banks. Now, by saying that the *American Surety* case must be read into § 1348, the Petitioner is making the opposite argument, that Congress must have fully contemplated the possibility of interstate branch banks because of one lone instance

in which that situation arose. The fact that interstate branch banking was so rare in 1948, when the statute was enacted in its present form, indicates that this possibility was not a significant factor in the congressional intent. In any event, the specific and direct treatment of the terms in the actual statutes dealing with jurisdiction over national banks as opposed to corporations, and dealing with venue as opposed to jurisdiction over national banks, is a better measure of congressional intent than a vague and general analogy between corporations and national banks.

G. The Concept Of Citizenship Does Not Require A National Bank To Be Deemed A Citizen Of Only One State.

In its Amicus Brief, The Comptroller approaches the case with an argument about the meaning of citizenship. The Comptroller insists that citizenship is limited to one place. (Amicus Brief, p. 14-15). Therefore, the argument goes, § 1348 must imply that a national bank can be deemed to be a citizen only of one state. Although the Comptroller's discussion of the broad outlines of citizenship of individuals and corporations is illuminating, it fails to mention that corporations may have multiple citizenship. Section 1332 explicitly recognizes that citizenship for corporations is not limited to a single state. Moreover, as discussed above, the courts have long and consistently held that a corporation will be deemed a citizen of every state in which it is incorporated. This is also true in many other business organizations. In limited partnerships, for example, diversity must be

established with reference not only to the general partners, but to all partners. *Carden v. Arkoma Associates*, 494 U.S. 185 (1990). Similarly, a limited liability company shares the citizenship of all its members. *GMAC Commercial Credit LLC v. Dillard Dept. Stores, Inc.*, 357 F.3d 827 (8th Cir. 2004); *Belleville Catering Co. v. Champaign Market Place, L.L.C.*, 350 F.3d 691 (7th Cir. 2003); *Rolling Greens MHP, L.P. v. Comcast SCH Holding L.L.C.*, 374 F.3d 1020 (11th Cir. 2004). Even with regard to banks, there is no practical limitation to multiple citizenship. It appears, for example, from an examination of the public records of the offices of the Secretary of State for North Carolina and the Secretary of State for South Carolina, that the predecessor of the Petitioner (First Union Corporation) actually operated separate banking companies in each of those states, as First Union Corporation of North Carolina and First Union Corporation of South Carolina.

The Comptroller asserts that "[a]s with natural persons, the fact that a corporation of one State maintains a physical presence in another State does not render it a citizen of the latter State." (Amicus Brief, p 15). Presumably, this means that a national bank, by analogy, does not acquire citizenship in every state where it operates a branch office, and that a national bank can be deemed a citizen only of a state designated in its organizational certificate, just as a corporation will be deemed a citizen of a state where it is incorporated.

Such an analogy breaks down, however, when the differences between the two statutes are

considered. Section 1332 expressly speaks in terms of where the corporation is incorporated, and limits citizenship based on the corporation's physical presence to where its principal place of business is maintained. Section 1348, however, speaks in terms of where the national bank is located. It contains no reference to the bank's organizational certificate. To be sure, with regard to a national bank's physical presence, the statute does not attach any limiting language to the word "located." Indeed, considering the connotation of "doing business," which the word "located" carries from its early statutory history, the only physical presence requirement on a national bank under § 1348 is whether it is doing business. In any event, § 1348 contains nothing like the express limitation in § 1332 concerning a corporation's principal place of business.

CONCLUSION

For these reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed, and the case dismissed.

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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WACHOVIA BANK, NATIONAL ASSOCIATION *v.* SCHMIDT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 04–1186. Argued November 28, 2005—Decided January 17, 2006

Petitioner Wachovia Bank, National Association (Wachovia), is a national banking association with its designated main office in North Carolina and branch offices in many States, including South Carolina. Plaintiff-respondent Schmidt and other South Carolina citizens sued Wachovia in a South Carolina state court for fraudulently inducing them to participate in an illegitimate tax shelter. Shortly thereafter, Wachovia filed a petition in Federal District Court, seeking to compel arbitration of the dispute. As the sole basis for federal-court jurisdiction, Wachovia alleged the parties' diverse citizenship. See 28 U. S. C. §1332. The District Court denied Wachovia's petition on the merits. On appeal, the Fourth Circuit determined that the District Court lacked subject-matter jurisdiction over the action, vacated the judgment, and instructed the District Court to dismiss the case. The appeals court observed that Wachovia's citizenship for diversity purposes is controlled by §1348, which provides that "national banking associations" are "deemed citizens of the States in which they are respectively located." As the court read §1348, Wachovia is "located" in, and is therefore a "citizen" of, every State in which it maintains a branch office. Thus, Wachovia's South Carolina branch operations rendered it a citizen of that State. Given the South Carolina citizenship of the opposing parties, the court concluded that the matter could not be adjudicated in federal court.

Held: A national bank, for §1348 purposes, is a citizen of the State in which its main office, as set forth in its articles of association, is located. Pp. 5–15.

(a) When Congress first authorized national banks, it allowed them to sue and be sued in federal court in any and all civil proceedings.

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State banks, however, could initiate actions in federal court only on the basis of diversity of citizenship or the existence of a federal question. Congress ended national banks' automatic qualification for federal jurisdiction in 1882, placing them "on the same footing as the banks of the state where they were located," *Leather Manufacturers' Bank* v. *Cooper*, 120 U. S. 778, 780. In an 1887 enactment, Congress first used the "located" language today contained in §1348. Like its 1882 predecessor, the 1887 Act "sought to limit . . . the access of national banks to, and their suability in, the federal courts to the same extent [as] non-national banks." *Mercantile Nat. Bank at Dallas* v. *Langdeau*, 371 U. S. 555, 565–566. In the Judicial Code of 1911, Congress combined two formerly discrete provisions on proceedings involving national banks, but retained without alteration the "located" clause. Finally, as part of the 1948 Judicial Code revision, Congress enacted §1348 in its current form. Pp. 5–7.

(b) The Fourth Circuit advanced three principal reasons for deciding that Wachovia is "located" in, and therefore a "citizen" of, every State in which it maintains a branch office. First, consulting dictionaries, the court observed that the term "located" refers to "physical presence in a place." Next, the court noted that §1348 uses two distinct terms to refer to the presence of a banking association: "established" and "located." The court concluded that, to give independent meaning to each word, "established" should be read to refer to the bank's charter location and "located," to the place where the bank has a physical presence. Finally, the court relied on *Citizens & Southern Nat. Bank* v. *Bougas*, 434 U. S. 35, in which this Court interpreted the term "located" in the former venue statute for national banks, see 12 U. S. C. §94 (1976 ed.), as encompassing any county in which a bank maintains a branch office. Viewing the jurisdiction and venue statutes as pertaining to the same subject matter, the court concluded that, under the *in pari materia* canon, the two statutes should be interpreted consistently. Pp. 7–8.

(c) None of the Fourth Circuit's rationales persuade this Court to read §1348 to attribute to a national bank, for diversity-jurisdiction purposes, the citizenship of each State in which the bank has established branch operations. First, the term "located," as it appears in the National Bank Act, has no fixed, plain meaning. In some provisions, the word unquestionably refers to the site of the banking association's designated main office, but in others, "located" apparently refers to or includes branch offices. Recognizing the controlling significance of context, this Court stated in *Bougas*: "There is no enduring rigidity about the word 'located.'" 434 U. S., at 44. Second, Congress may well have comprehended the words "located" and "established," as used in §1348, as synonymous terms. When Con-

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gress enacted §1348's statutory predecessors and §1348 itself, a national bank was almost always "located" only in the State in which it was "established," under any of the proffered definitions of the two words. For with rare exceptions a national bank could not operate a branch outside its home State until 1994, when Congress broadly authorized national banks to establish branches across state lines. Congress' use of the two terms may be best explained as a coincidence of statutory codification. Deriving from separate provisions enacted in different years, the word "established" appearing in the first paragraph of §1348 and the word "located" appearing in the second paragraph were placed in the same section in the 1911 revision. The codifying Act stated that provisions substantially the same as existing statutes should not be treated as new enactments. Thus, it is unsurprising that in 1947, this Court, referring to a national bank's citizenship under the 1911 Act, used the terms "established" and "located" as alternatives. See *Cope* v. *Anderson*, 331 U. S. 461, 467. Finally, *Bougas* does not control §1348's meaning. Although it is true that, under the *in pari materia* canon, statutes addressing the same subject matter generally should be read " 'as if they were one law,' " *Erlenbaugh* v. *United States*, 409 U. S. 239, 243, venue and subject-matter jurisdiction are not concepts of the same order. Venue, largely a matter of litigational convenience, is waived if not timely raised. Subject-matter jurisdiction, on the other hand, concerns a court's competence to adjudicate a particular category of cases; a matter far weightier than venue, subject-matter jurisdiction must be considered by the court on its own motion, even if no party raises an objection. Cognizant that venue "is primarily a matter of choosing a convenient forum," *Leroy* v. *Great Western United Corp.*, 443 U. S. 173, 180, the Court in *Bougas* stressed that its "interpretation of [the former] §94 [would] not inconvenience the bank or unfairly burden it with distant litigation," 434 U. S., at 44, n. 10. Subject-matter jurisdiction, however, does not entail an assessment of convenience. It poses the question "whether" the Legislature empowered the court to hear cases of a certain genre. Thus, the considerations that account for the *Bougas* decision are inapplicable to §1348, a prescription governing subject-matter jurisdiction, and the Court of Appeals erred in interpreting §1348 *in pari materia* with the former §94. Significantly, *Bougas'* reading of former §94 effectively aligned the treatment of national banks for venue purposes with the treatment of state banks and corporations. By contrast, the Fourth Circuit's decision in this case severely constricts national banks' access to diversity jurisdiction as compared to the access generally available to corporations, for corporations ordinarily rank as citizens only of States in which they are incorporated or maintain their principal place of

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business, and are not deemed citizens of every State in which they maintain a business establishment. Pp. 8–14.

388 F. 3d 414, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which all other Members joined, except THOMAS, J., who took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–1186

WACHOVIA BANK, NATIONAL ASSOCIATION, PETITIONER *v.* DANIEL G. SCHMIDT, III, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[January 17, 2006]

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the citizenship, for purposes of federal-court diversity jurisdiction, of national banks, *i.e.*, corporate entities chartered not by any State, but by the Comptroller of the Currency of the U. S. Treasury. Congress empowered federal district courts to adjudicate civil actions between "citizens of different States" where the amount in controversy exceeds $75,000. 28 U. S. C. §1332(a)(1). A business organized as a corporation, for diversity jurisdiction purposes, is "deemed to be a citizen of any State by which it has been incorporated" and, since 1958, also "of the State where it has its principal place of business." §1332(c)(1). State banks, usually chartered as corporate bodies by a particular State, ordinarily fit comfortably within this prescription. Federally chartered national banks do not, for they are not incorporated by "any State." For diversity jurisdiction purposes, therefore, Congress has discretely provided that national banks "shall . . . be deemed citizens of the States in which they are respectively located." §1348.

The question presented turns on the meaning, in

§1348's context, of the word "located." Does it signal, as the petitioning national bank and the United States, as *amicus curiae*, urge, that the bank's citizenship is determined by the place designated in the bank's articles of association as the location of its main office? Or does it mean, in addition, as respondents urge and the Court of Appeals held, that a national bank is a citizen of every State in which it maintains a branch?

Recognizing that "located" is not a word of "enduring rigidity," *Citizens & Southern Nat. Bank* v. *Bougas*, 434 U. S. 35, 44 (1977), but one that gains its precise meaning from context, we hold that a national bank, for §1348 purposes, is a citizen of the State in which its main office, as set forth in its articles of association, is located. Were we to hold, as the Court of Appeals did, that a national bank is additionally a citizen of every State in which it has established a branch, the access of a federally chartered bank to a federal forum would be drastically curtailed in comparison to the access afforded state banks and other state-incorporated entities. Congress, we are satisfied, created no such anomaly.

I

Petitioner Wachovia Bank, National Association (Wachovia), is a national banking association with its designated main office in Charlotte, North Carolina.[1] Wachovia

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[1] A national bank, on formation, must designate, in its organization certificate and articles of association, the "place where its operations of discount and deposit are to be carried on." 12 U. S. C. §22 (Second); see §21; Office of the Comptroller of the Currency, Instructions—Articles of Association, Specific Requirements ¶12, available at http://www.occ.treas.gov/corpbook/forms/articles-conv.doc (All Internet materials as visited Jan. 13, 2006, and included in Clerk of Court's case file.) The place so designated serves as the bank's "main office." Changes in the location of that office are effected by amendment to the bank's articles of association. See 12 U. S. C. §§21a, 30(b); 12 CFR §5.40(d)(2)(ii) (2005). The State in which the main office is located

operates branch offices in many States, including South Carolina.[2]

The litigation before us commenced when plaintiff-respondent Daniel G. Schmidt III and others, citizens of South Carolina, sued Wachovia in a South Carolina state court for fraudulently inducing them to participate in an illegitimate tax shelter. Shortly thereafter, Wachovia filed a petition in the United States District Court for the District of South Carolina, seeking to compel arbitration of the dispute. As the sole basis for federal-court jurisdiction, Wachovia alleged the parties' diverse citizenship. See 28 U. S. C. §1332. The District Court denied Wachovia's petition on the merits; neither the parties nor the court questioned the existence of federal subject-matter jurisdiction. On appeal, a divided Fourth Circuit panel determined that the District Court lacked diversity jurisdiction over the action; it therefore vacated the judgment and instructed the District Court to dismiss the case.

The Court of Appeals' majority observed that Wacho-

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qualifies as the bank's "home State" under the banking laws. 12 U. S. C. §36(g)(3)(B).

[2] National banks originally lacked authority to operate branch offices. Act of Feb. 25, 1863, §11, 12 Stat. 668. In 1865, Congress enacted an exception permitting a state bank that converted to a national bank to retain its pre-existing branches. Act of Mar. 3, 1865, §7, 13 Stat. 484. Congress authorized limited branch operations in the bank's home State in 1927 and 1933. McFadden Act (Branch Banks), 1927, §7(c), 44 Stat. 1228; Glass-Steagall Act, 1933, §23, 48 Stat. 189–190. These Acts, like the 1865 enactment, allowed interstate branching only under narrow "grandfather" provisions. McFadden Act, §7(a)–(b), 44 Stat. 1228; see *Girard Bank* v. *Board of Governors of Fed. Reserve System*, 748 F. 2d 838, 840 (CA3 1984) (observing that only two national banks had "grandfathered" interstate branches). Not until 1994 did Congress grant national banks broad authority to establish branch offices across state lines. See Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, §101, 108 Stat. 2339. See generally J. Macey, G. Miller, & R. Carnell, Banking Law and Regulation 18–19, 23, 32–33 (3d ed. 2001).

via's citizenship for diversity purposes is controlled by §1348, which provides that "national banking associations" are "deemed citizens of the States in which they are respectively located." As the panel majority read §1348, Wachovia is "located" in, and is therefore a "citizen" of, every State in which it maintains a branch office. Thus Wachovia's branch operations in South Carolina, in the majority's view, rendered the bank a citizen of South Carolina. Given the South Carolina citizenship of the opposing parties, the majority concluded that the matter could not be adjudicated in federal court. 388 F. 3d 414, 432 (CA4 2004).

Circuit Judge King dissented. He read §1348 and its statutory precursors to provide national banks with "the same access to federal courts as that accorded other banks and corporations." *Id.*, at 434. On his reading, Wachovia is a citizen only of North Carolina, the State in which its main office is located, not of every State in which it maintains a branch office; accordingly, he concluded, Wachovia's petition qualified for federal-court adjudication.[3]

We granted certiorari to resolve the disagreement among Courts of Appeals on the meaning of §1348. 545 U. S. ___ (2005). Compare *Horton* v. *Bank One, N. A.*, 387 F. 3d 426, 429, 431 (CA5 2004) (for §1348 purposes, "a national bank is not 'located' in, and thus [is] not a citizen of, every state in which it has a branch"; rather, the provision retains "jurisdictional parity for national banks vis-à-vis state banks and corporations"), and *Firstar Bank, N. A.* v. *Faul*, 253 F. 3d 982, 993–994 (CA7 2001) (same), with 388 F. 3d, at 432 (§1348 renders national bank a citizen, not only of the State in which its main office is located, but

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[3] Wachovia unsuccessfully moved for rehearing en banc. Six judges voted to grant the rehearing petition, three voted to deny it, and four recused themselves. Thus the petition failed to garner the required majority of the Circuit's 13 active judges. No. 03–2061 (CA4, Jan. 28, 2005), App. to Pet. for Cert. 57a–58a.

also of every State in which it has branch operations), and *World Trade Center Properties, LLC* v. *Hartford Fire Ins. Co.*, 345 F. 3d 154, 161 (CA2 2003) (dictum) (same).

II

When Congress first authorized national banks in 1863, it specified that any "suits, actions, and proceedings by and against [them could] be had" in federal court. See Act of Feb. 25, 1863, §59, 12 Stat. 681. National banks thus could "sue and be sued in the federal district and circuit courts solely because they were national banks, without regard to diversity, amount in controversy or the existence of a federal question in the usual sense." *Mercantile Nat. Bank at Dallas* v. *Langdeau*, 371 U. S. 555, 565–566 (1963). State banks, however, like other state-incorporated entities, could initiate actions in federal court only on the basis of diversity of citizenship or the existence of a federal question. See *Petri* v. *Commercial Nat. Bank of Chicago*, 142 U. S. 644, 648–649 (1892).

Congress ended national banks' automatic qualification for federal jurisdiction in 1882. An enactment that year provided in relevant part:

> "[T]he jurisdiction for suits hereafter brought by or against any association established under any law providing for national-banking associations . . . shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business when such suits may be begun[.]" Act of July 12, 1882, §4, 22 Stat. 163.

Under this measure, national banks could no longer invoke federal-court jurisdiction solely "on the ground of their Federal origin," *Petri*, 142 U. S., at 649; instead, for federal jurisdictional purposes, Congress placed national

banks "on the same footing as the banks of the state where they were located," *Leather Manufacturers' Bank* v. *Cooper*, 120 U. S. 778, 780 (1887).

In 1887 revisions to prescriptions on federal jurisdiction, Congress replaced the 1882 provision on jurisdiction over national banks and first used the "located" language today contained in §1348. The 1887 provision stated in relevant part:

> "[A]ll national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, *be deemed citizens of the States in which they are respectively located;* and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State." Act of Mar. 3, 1887, §4, 24 Stat. 554–555 (emphasis added).[4]

Like its 1882 predecessor, the 1887 Act "sought to limit . . . the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks [were] so limited." *Langdeau*, 371 U. S., at 565–566.

In the Judicial Code of 1911,[5] Congress combined two formerly discrete provisions on proceedings involving national banks, but retained without alteration the clause deeming national banks to be "citizens of the States in which they are respectively located." Act of Mar. 3, 1911,

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[4]The term "established under" did appear in the 1882 and 1887 formulations, in both texts as synonymous with the term "organized under." In neither measure is the word used in a locational sense.

[5]Earlier, in 1888, Congress had revised the 1887 prescription by adding as a separate paragraph this caveat: "The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." Act of Aug. 13, 1888, §4, 25 Stat. 436.

§24 (Sixteenth), 36 Stat. 1091–1093.[6] Finally, as part of the 1948 Judicial Code revision, Congress enacted §1348 in its current form. Act of June 25, 1948, 62 Stat. 933. The provision now reads:

> The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.
>
> "All national banking associations shall, for the purpose of all other actions by or against them, be deemed citizens of the States in which they are respectively located." 28 U. S. C. §1348.

III

The Fourth Circuit panel majority advanced three prin-

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[6] In full, the 1911 text stated:

"The district courts shall have original jurisdiction . . . [o]f all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located." 36 Stat. 1091–1093. The first sentence of this formulation merged the 1888 caveat with text, including the word "established," originally contained in the Act of Dec. 1, 1873, §629 (Tenth to Eleventh), 18 Stat. 111. The second sentence, including the word "located," derives from the 1887 formulation.

cipal reasons for deciding that Wachovia is "located" in, and therefore a "citizen" of, every State in which it maintains a branch office. First, consulting dictionaries, the Court of Appeals observed that "[i]n ordinary parlance" the term "located" refers to "physical presence in a place." 388 F. 3d, at 416–417 (internal quotation marks omitted). Banks have a physical presence, the Fourth Circuit stated, wherever they operate branches. *Id.*, at 417. Next, the court noted, "Section 1348 uses two distinct terms to refer to the presence of a banking association: 'established' and 'located.'" *Id.*, at 419. "To give independent meaning" to each word, the court said, "it is most reasonable to understand the place where a national bank is 'established' to refer to a bank's charter location, and to understand the place where it is 'located' to refer to the place or places where it has a physical presence." *Ibid.* Finally, the Court of Appeals stressed that in *Citizens & Southern Nat. Bank* v. *Bougas*, 434 U. S. 35 (1977), this Court interpreted the term "located" in the former venue statute for national banks, see 12 U. S. C. §94 (1976 ed.), as encompassing any county in which a bank maintains a branch office. 388 F. 3d, at 419–420. Reasoning that "the jurisdiction and venue statutes pertain to the same subject matter, namely the amenability of national banking associations to suit in federal court," the panel majority concluded that, "under the *in pari materia* canon[,] the two statutes should be interpreted" consistently. *Id.*, at 422.

IV

None of the Court of Appeals' rationales persuade us to read §1348 to attribute to a national bank, for diversity jurisdiction purposes, the citizenship of each State in which the bank has established branch operations. First, the term "located," as it appears in the National Bank Act, has no fixed, plain meaning. In some provisions, the word unquestionably refers to a single place: the site of the

banking association's designated main office. See, *e.g.*, 12 U. S. C. §52 (national bank's capital stock certificates must state "the name and location of the association"); §55 (requiring notice of sale of capital stock "in a newspaper of the city or town in which the bank is located"); §75 (bank's regular annual shareholders' meeting shall be rescheduled when it "falls on a legal holiday in the State in which the bank is located"); §182 (requiring publication of a notice of dissolution "in the city or town in which the association is located"). In other provisions, "located" apparently refers to or includes branch offices. See, *e.g.*, §36(j) (defining "branch" to include "any branch place of business located in any State"); §85 (limiting interest rate charged by national bank to "rate allowed by the laws of the State, Territory, or District where the bank is located") (construed in OCC Interpretive Letter No. 822 (Feb. 17, 1998), [1997–1998 Transfer Binder] CCH Fed. Banking L. Rep. ¶81–265, pp. 90,256-90,257); §92 (permitting national bank to act as insurance agent in certain circumstances when bank is "located and doing business in any place the population of which does not exceed five thousand inhabitants") (construed in 12 CFR §7.1001 (2005)).[7] Recognizing the controlling significance of context, we stated in *Bougas*, regarding a venue provision for national banks: "There is no enduring rigidity about the word 'located.'" 434 U. S., at 44.

Second, Congress may well have comprehended the

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[7]The Court of Appeals did not overlook these nonuniform uses of the word "located" in various provisions of the National Bank Act. See 388 F. 3d 414, 425 (CA4 2004). Nevertheless, it declared that, in §1348, "located" unambiguously means "physically present." *Ibid.* (internal quotation marks omitted). The court did not say what facilities other than branch offices, for example, storage sites or even automated teller machines, would suffice to establish a bank's physical presence. Cf. Tr. of Oral Arg. 36–37 (counsel for respondents stated that an ATM, although an arguable question, probably would suffice to locate a bank in a State for §1348 purposes).

words "located" and "established," as used in §1348, not as contrasting, but as synonymous or alternative terms. When Congress enacted §1348's statutory predecessors and then §1348 itself, a national bank was almost always "located" only in the State in which it was "established," under any of the proffered definitions of the two words, for, with rare exceptions, a national bank could not operate a branch outside its home State. Not until 1994 did Congress provide broad authorization for national banks to establish branches across state lines. See *supra*, at 3, n. 2. Congress' use of the two terms may be best explained as a coincidence of statutory codification. Deriving from separate provisions enacted in different years, the word "established" appearing in the first paragraph of §1348 and the word "located" appearing in the second paragraph were placed in the same section in the 1911 revision of the Judicial Code. See *supra*, at 6–7, n. 6. The codifying Act explicitly stated that "so far as [its provisions were] substantially the same as existing statutes," they should "be construed as continuations thereof, and not as new enactments." Act of Mar. 3, 1911, §294, 36 Stat. 1167; see *Federal Intermediate Credit Bank of Columbia* v. *Mitchell*, 277 U. S. 213, 216 (1928) (1911 Act "was in substance a reenactment of the earlier provisions in respect of . . . jurisdiction"). In this light, it is unsurprising that, in 1947, this Court, referring to a national bank's citizenship under the 1911 Act, used the terms "located" and "established" as alternatives. See *Cope* v. *Anderson*, 331 U. S. 461, 467 (1947) ("For jurisdictional purposes, a national bank is a 'citizen' of the state in which it is established or located[.]").[8]

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[8]Context also matters in assigning meaning to the word "established." See, *e.g.*, Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, S. Treaty Doc. No. 107–19, Art. 5, pp. 8–9 (2002)

Finally, *Bougas* does not control the meaning of §1348. In that case, we construed a now-repealed venue provision, which stated that actions against national banking associations could be filed "in any State, county, or municipal court in the county or city in which said association [was] located." 434 U. S., at 35–36 (quoting 12 U. S. C. §94 (1976 ed.)). We held that, for purposes of this provision, a national bank was located, and venue was therefore proper, in any county or city where the bank maintained a branch office. 434 U. S., at 44–45. True, under the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read "'as if they were one law.'" *Erlenbaugh* v. *United States*, 409 U. S. 239, 243 (1972) (quoting *United States* v. *Freeman*, 3 How. 556, 564 (1845)). But venue and subject-matter jurisdiction are not concepts of the same order. Venue is largely a matter of litigational convenience; accordingly, it is waived if not timely raised. See, *e.g.*, *Heckler* v. *Ringer*, 466 U. S. 602, 638, n. 25 (1984); Fed. Rule Civ. Proc. 12(h)(1). Subject-matter jurisdiction, on the other hand, concerns a court's competence to adjudicate a particular category of cases; a matter far weightier than venue, subject-matter jurisdiction must be considered by the court on its own motion, even if no party raises an objection. See, *e.g.*, *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379,

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("For the purposes of this Convention, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on . . . ."). Given the character of the proceedings covered by the first paragraph of §1348, see *supra*, at 7, one might read "established" as referring to the bank's main office as set forth in its articles of association. Other readings mentioned in Court of Appeals opinions are the bank's principal place of business and the place listed in the bank's organization certificate. See *Horton* v. *Bank One, N. A.*, 387 F. 3d 426, 434 (CA5 2004); *Firstar Bank, N. A.* v. *Faul*, 253 F. 3d 982, 992 (CA7 2001). Because this issue is not presented by the parties or necessary to today's decision, we express no opinion on it. Cf. *ibid.*

382 (1884); Fed. Rule Civ. Proc. 12(h)(3).

Cognizant that venue "is primarily a matter of choosing a convenient forum," *Leroy* v. *Great Western United Corp.*, 443 U. S. 173, 180 (1979), the Court in *Bougas* stressed that its "interpretation of [the former] §94 [would] not inconvenience the bank or unfairly burden it with distant litigation," 434 U. S., at 44, n. 10. Subject-matter jurisdiction, however, does not entail an assessment of convenience. It poses a "whether," not a "where" question: Has the Legislature empowered the court to hear cases of a certain genre? See *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 168 (1939) ("This basic difference between the court's power and the litigant's convenience is historic in the federal courts."). Thus, the considerations that account for our decision in *Bougas* are inapplicable to §1348, a prescription governing subject-matter jurisdiction, and the Court of Appeals erred in interpreting §1348 *in pari materia* with the former §94.

Significantly, this Court's reading of the venue provision in *Bougas* effectively aligned the treatment of national banks for venue purposes with the treatment of state banks and corporations. For venue in suits against state banks and other state-created corporations typically lies wherever those entities have business establishments. See 19 C. J. S., Corporations §717(d), p. 374, n. 30 (1990) (under typical state venue statutes, "[v]enue in action against domestic corporation can be laid in any county where corporation maintains branch office"). By contrast, the Court of Appeals' decision in the instant case severely constricts national banks' access to diversity jurisdiction as compared to the access available to corporations generally. For purposes of diversity, a corporation surely is not deemed a citizen of every State in which it maintains a business establishment. See *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 295–296 (1886). Rather, under 28 U. S. C. §1332(c)(1), a corporation is

"deemed to be a citizen" only of "any State by which it has been incorporated" and "of the State where it has its principal place of business." Accordingly, while corporations ordinarily rank as citizens of at most 2 States, Wachovia, under the Court of Appeals' novel citizenship rule, would be a citizen of 16 States. See FDIC Institution Directory, available at http://www2.fdic.gov/idasp/ main.asp.[9] *Bougas* does not call for this anomalous result.

V

To summarize, "located," as its appearances in the banking laws reveal, see *supra*, at 8–9, is a chameleon word; its meaning depends on the context in and purpose for which it is used.

In the context of venue, "located" may refer to multiple places, for a venue prescription, *e.g.*, the current and former 12 U. S. C. §94, presupposes subject-matter jurisdiction and simply delineates *where* within a given judicial system a case may be maintained. See, *e.g.*, 28 U. S. C. §1391(c) (for venue purposes, "a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced").

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[9]To achieve complete parity with state banks and other state-incorporated entities, a national banking association would have to be deemed a citizen of both the State of its main office and the State of its principal place of business. See *Horton*, 387 F. 3d, at 431, and n. 26; *Firstar Bank, N. A.*, 253 F. 3d, at 993–994. Congress has prescribed that a corporation "shall be deemed to be a citizen of any State by which it has been incorporated *and* of the State where it has its principal place of business." 28 U. S. C. §1332(c)(1) (emphasis added). The counterpart provision for national banking associations, §1348, however, does not refer to "principal place of business"; it simply deems such associations "citizens of the States in which they are respectively located." The absence of a "principal place of business" reference in §1348 may be of scant practical significance for, in almost every case, as in this one, the location of a national bank's main office and of its principal place of business coincide.

In contrast, in §1348, "located" appears in a prescription governing not venue but federal-court subject-matter jurisdiction. Concerning access to the federal court system, §1348 deems national banks "citizens of the States in which they are respectively located." There is no reason to suppose Congress used those words to effect a radical departure from the norm. An individual who resides in more than one State is regarded, for purposes of federal subject-matter (diversity) jurisdiction, as a citizen of but one State. See *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U. S. 826, 828 (1989) (an individual is deemed a citizen of the State of her domicil); *Williamson* v. *Osenton*, 232 U. S. 619, 625 (1914) (domicil is the "technically preeminent headquarters" of a person; "[i]n its nature it is one"). Similarly, a corporation's citizenship derives, for diversity jurisdiction purposes, from its State of incorporation and principal place of business. §1332(c)(1). It is not deemed a citizen of every State in which it conducts business or is otherwise amenable to personal jurisdiction. Reading §1348 in this context, one would sensibly "locate" a national bank for the very same purpose, *i.e.*, qualification for diversity jurisdiction, in the State designated in its articles of association as its main office.

Treating venue and subject-matter jurisdiction prescriptions as *in pari materia*, 388 F. 3d, at 422–423, the Court of Appeals majority overlooked the discrete offices of those concepts. See *supra*, at 11–12; cf. Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333, 337 (1933) ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against."). The resulting Fourth Circuit decision rendered national banks singularly disfavored corporate bodies with regard to their access to fed-

eral courts. The language of §1348 does not mandate that incongruous outcome, nor does this Court's precedent.

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Fourth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS took no part in the consideration or decision of this case.